

The Doctrine of Reasonable Expectations in Insurance Law After Two Decades

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I. INTRODUCTION

It has been twenty years since Professor (now United States District Judge) Robert E. Keeton identified a number of cases interpreting insurance contracts that, in his opinion, deserved to be recognized as delineating new principles of insurance law. In his now famous two-part article¹ examining rights of policyholders and other claimants, he argued that it was very difficult to reconcile a significant number of the cases with the orthodox doctrines—such as construing ambiguities, waiver, estoppel, election, reformation and rescission—which previously had evolved in recognition of rights at variance with contract provisions generally.² Recognition of two broad principles, he submitted, would explain most of what otherwise appeared to be an undue number of aberrational insurance decisions. He stated the principles as follows: (1) an insurer will be denied any unconscionable advantage in an insurance transaction, and (2) the reasonable expectations of applicants and intended beneficiaries will be honored.³

The second principle—the one receiving the most attention and the one upon which this article will focus—has come to be known as the “doctrine” of reasonable expectations.⁴ In one formulation or another, it has been embraced by a number of jurisdictions in the last two decades.⁵ In the process, it has become the subject of considerable comment in the legal literature. Some commentators have applauded this development in insurance law,⁶ whereas it has been greeted with stern criticism in other quarters.⁷ Still others, generally

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1. Keeton, *Insurance Law Rights At Variance With Policy Provisions: Part One*, 83 HARV. L. REV. 961 (1970) (hereinafter Keeton, *Rights At Variance*). See also Keeton, *Insurance Law Rights At Variance With Policy Provisions: Part Two*, 83 HARV. L. REV. 1281 (1970).

2. *Id.*

3. *Id.*

4. See, e.g., R.H. JERRY, II, UNDERSTANDING INSURANCE LAW § 25D (1987).

5. As many as sixteen states may be viewed as having adopted the doctrine, but it is not clear whether every court intended to embrace the broadest formulation. The particular cases are analyzed and discussed later. See *infra* notes 22-67 and accompanying text.

6. Cohen, *Flight Insurance: Conforming to the Reasonable Expectations of the Insured*, 30 FED. INS. COUNS. Q. 19 (1979); Kamarck, *Opening the Gate: The Steven Case and the Doctrine of Reasonable Expectations*, 29 HASTINGS L.J. 153 (1977); Keeton, *Reasonable Expectations in the Second Decade*, 12 FORUM 275 (1976); Keeton, *Honoring Reasonable Expectations in the Interpretation of Life and Health Insurance Contracts*, 1971 A.B.A. SEC. INS., NEGL. & COMP. L. PROCEEDINGS 213; Comment, *Insurer Liability in the Asbestos Disease Context—Application of the Reasonable Expectations Doctrine*, 27 S.D.L. REV. 239 (1982); Note, *Interpreting the “Business Pursuits” Exclusion in Homeowner’s Policies—Toward Honoring “Reasonable Expectations,”* 25 S.D.L. REV. 132 (1980).

7. Anderson, *Reasonable Expectations and Insurance Contracts: What Should We Reasonably Expect from Judges*, 28 FOR THE DEFENSE 9 (April 1986); Anderson, *Life Insurance Conditional Receipts and Judicial Intervention*, 63 MARQ. L. REV. 593 (1980); Birnbaum, Stahl & West, *Standardized Agreements and the Parol Evidence Rule: Defining and Applying the Expectations Principle*, 26 ARIZ. L. REV. 793 (1984); Gardner, *Reasona-*

favorable in their appraisals, have noted that the cases applying the principle provided little guidance in the way of doctrinal content and have offered constructive suggestions to eliminate what they view as deficiencies.⁸ Nevertheless, even after two decades, there still seems to exist a great deal of uncertainty as to the doctrinal content and when the principle may be invoked, including most of the jurisdictions that have professed to have adopted it. In short, questions remain as to whether the principle has developed into a full-fledged doctrine which can be applied in a predictable and evenhanded manner by the courts.

ble Expectations: Evolution Completed or Revolution Begun?, 1978 INS. L.J. 573; Kelso, *Idaho and the Doctrine of Reasonable Expectations: A Springboard for an Analysis of a New Approach to a Valuable But Often Misunderstood Doctrine*, 47 INS. COUNS. J. 325 (1980); Kimball, Book Review, 19 CONN. L. REV. 311 (1987) (reviewing K. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* (1986)); Squires, *A Skeptical Look at the Doctrine of Reasonable Expectation*, 6 FORUM 252 (1971); Comment, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461 (1989); Comment, *Reasonable Expectations: Contract Ambiguity v. Arbitrary Application*, 34 DRAKE L. REV. 1065 (1985-86); Comment, *The Reconstruction of Insurance Contracts Under the Doctrine of Reasonable Expectations*, 18 J. MARSHALL L. REV. 155 (1984); Comment, *A Reasonable Approach to the Doctrine of Reasonable Expectations as Applied to Insurance Contracts*, 13 U. MICH. J.L. REF. 603 (1980); Comment, *Insurance Law—Insurance Contract Interpretation: The Doctrine of Reasonable Expectations Has No Place in Illinois*, 1985 S. ILL. U.L.J. 687; Note, *Reasonable Expectations: The Insurer's Dilemma*, 24 DRAKE L. REV. 853 (1975); Note, *Reasonable Expectations and Bad Faith in the Settlement of a Health Insurance Claim*, 19 FORUM 340 (1983/84); Note, *Reasonable Expectations Approach to Insurance Contract Interpretation Modified in Missouri*, 47 MO. L. REV. 577 (1982); Note, *The Doctrine of Reasonable Expectations in Massachusetts and New Hampshire: A Comparative Analysis*, 17 NEW ENG. L. REV. 891 (1982); Note, *A Common Law Alternative to the Doctrine of Reasonable Expectations in the Construction of Insurance Contracts*, 57 N.Y.U. L. REV. 1175 (1982); Note, *The Role of Public Policy and Reasonable Expectations in Construing Insurance Contracts*, 47 TEMPLE L.Q. 748 (1974).

8. See, e.g., Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151 (1981); Mayhew, *Reasonable Expectations: Seeking a Principled Application*, 13 PEPPERDINE L. REV. 267 (1986); Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323 (1986); Slawson, *The New Meaning of Contract*, 21 TRIAL 27 (Dec. 1985).

For other works discussing the doctrine of reasonable expectation or cases applying it, see Boyle, *The Reasonable Expectations Doctrine in Massachusetts Insurance Law*, 32 BOSTON B.J. 16 (Mar./Apr. 1988); Clarke, *The Reasonable Expectations of the Insured—in England?*, 1989 J. BUS. L. 389 (Sept.); Gottsfeld, *Darner/Gordinier: The Darling of the Non-Drafting Party's Nursery*, 25 ARIZ. ATT'Y 35 (Oct. 1988); Leitner, *Enforcing the Consumer's "Reasonable Expectations" in Interpreting Insurance Contracts: A Doctrine in Search of Coherent Definition*, 38 FED'N INS. & CORP. COUNS. Q. 379 (1987/88); Ostrager & Ichel, *Should the Business Insurance Policy Be Construed Against the Insurer? Another Look at the Reasonable Expectations Doctrine*, 33 FED'N INS. COUNS. Q. 273 (1983); Perlet, *The Insurance Contract and the Doctrine of Reasonable Expectation*, 6 FORUM 116 (1971); Plitt, *When Is A Standardized Contract Binding?*, 23 ARIZ. B.J. 30 (Feb./Mar. 1988); Young, Lewis & Lee, *Insurance Contract Interpretation: Issues and Trends*, 1975 INS. L.J. 71 (Feb. 1975); Comment, *Decapitation to Cure Dandruff? The Scope of the Reasonable Expectations Doctrine of Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 20 ARIZ. ST. L.J. 841 (1988); Comment, *Insurance—Contracts—The Ambiguity in the Doctrine of Reasonable Expectations*, 62 N.D.L. REV. 423 (1986); Comment, *Great Expectations for the Reasonable Expectations Doctrine*, 12 WM. MITCHELL L. REV. 371 (1986); Note, *Insurance Law—Challenging Boilerplate Exclusions—Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 1984 ARIZ. ST. L.J. 751; Note, *Cochran Revisited: The Reasonable Expectations of the Insured and the Visible Marks of Forcible Entry Liability Limitation*, 18 CREIGHTON L. REV. 389 (1985); Note, *Insurance Law: The Doctrine of Reasonable Expectations*, 37 DRAKE L. REV. 741 (1987-88); Note, *Corgatelli v. Globe Life & Accident Insurance Co.*, 12 IDAHO L. REV. 97 (1975); Note, *Insurance—Contract and Policy—The Doctrine of Reasonable Expectations Applied to Void a Crop Spraying Exclusion*, 53 N.D.L. REV. 613 (1977); Recent Development: *Contracts—Insurance Law—Theories of Unconscionability, Reasonable Expectations and Implied Warranty Defeat Policy Clause Limiting Recovery to Burglary Evidenced by Exterior Marks*, C & J Fertilizer, Inc. v. Allied Mutual Insurance Co., 64 GEO. L.J. 987 (1976).

See also Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174 (1983); Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971); Comment, *Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine*, 88 COLUM. L. REV. 1849 (1988).

The purpose of this article is to dispel doubts concerning the doctrinal status of the principle by demonstrating that its jurisprudential core does consist of rules that provide sufficient guidelines for its application. In doing so, the article will briefly review the origins of and the inherent problems with the reasonable expectations principle, inventory the jurisdictions that have and have not embraced it, and identify and examine the important doctrinal developments over the last twenty years.

II. THE METAMORPHOSIS OF THE DOCTRINE

The emergence of the principle that courts will honor the reasonable expectations of policyholders and intended beneficiaries, and even applicants for insurance, is clear enough when viewed from today's vantage, but in 1970 its recognition depended on an unusual ability to analyze the cross-currents and to identify underlying relationships between cases of different fact patterns. Analysis of cases involving such disparate matters as the marketing of air-travel trip insurance, life insurance, and casualty insurance; the limits to which an insurer may restrict the meaning of "accidental bodily injuries;" and the extent of liability coverage under a homeowners policy led Professor Keeton to posit what he viewed as a new principle.⁹ He stated the principle in the following way:

The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.¹⁰

Relation of these seemingly unrelated cases under the theoretical arch of reasonable expectations was a masterstroke indeed. The relation lent a legitimacy to the opinions that was otherwise lacking because it provided a common rationale that went a long way toward refuting the notion that the opinions were the product of unprincipled prejudice against insurers. Nevertheless, Professor Keeton did not assert that the proposed principle offered a complete explanation.

Professor Keeton recognized at the outset that, as stated, this principle was too general to serve as a guide from which particularized decisions could be derived through an exercise of logic, and too broad to be universally true.¹¹ Nevertheless, he submitted that the principle accurately identified the direction in which insurance law was and should be moving.¹² He recognized that it may take time for the common law process to work out the exact doctrinal dimensions of any new principle. In 1976, six years after his original article, Professor Keeton discussed the distinctions between the recognition of a principle and the development of its doctrinal aspects:

Principles collide in a sense beyond doctrinal conflict. Doctrines are sets of explicit rules of decision—the outcomes of accommodation among competing principles. Conflicts among doctrines are imperfections yet to be worked out as the operational rules of the legal system evolve. The collision of principles, on the other hand, is a

9. Keeton, *Rights At Variance*, *supra* note 1, at 966-74.

10. *Id.* at 967.

11. *Id.*

12. *Id.*

phenomenon that does not signal imperfection of the legal system but rather signals the underlying conflict of interests with which the legal system must grapple.

A principle is a generalization so broad that it does not express all the qualifications and limitations that must be expressed in an accurate statement of a rule, or a set of rules of decision that constitute at least the framework, though not the full body, of a doctrine. The qualifications and limitations arise because of the collision of underlying principles. In short, a principle, as Professor Austin Scott has observed, is a proposition that is not true, exactly.¹³

Of course, the number and frequency of opportunities for a court of last resort to work out the doctrinal aspects of any new principle are, in many ways, quite fortuitous. Unlike the legislative process where a legal problem may be studied in its entirety and a complete solution formulated, the courts are most often required to follow a piecemeal approach. Thus has it been with the origin and doctrinal development of the principle of reasonable expectations. At any particular point in this process, it has not been all that clear where the boundaries lay. Only with the benefit of several decades of experience is it now possible to discern where the courts have been and where they are today.

As mentioned at the outset, one of the purposes of this article is to explore just how far the law has moved and in what directions. Has the principle of reasonable expectations been embraced widely and, if so, by whom? Has the principle been applied in such a way that one can discern rules from which particularized decisions can be derived through an exercise of logic? Have rules been articulated in such a way that one can intelligently predict the legal resolution of future disputes to which the rules apply? In other words, has a sufficient jurisprudential corpus developed regarding the reasonable expectations principle so that one can justify referring to this body of law as the doctrine of reasonable expectations? It is submitted that all these questions can now be answered in the affirmative.

III. UNDERSTANDING THE SUBSTANTIVE NATURE OF THE DOCTRINE

Identification of any doctrine may be facilitated by recognizing what is not essential for its invocation. Such recognition is particularly helpful here because there has been a tendency to confuse the substantive nature of the doctrine with a canon of construction. There are courts that employ the "reasonable expectations of an insured" as a test for resolving ambiguities in insurance policies.¹⁴ This test, whether phrased in these words or otherwise,¹⁵ is designed to give the insured the benefit of the doubt where the language of an insurance policy reasonably may be interpreted in more than one way. Such a canon of construction

13. Keeton, *Reasonable Expectations in the Second Decade*, 12 FORUM 275, 277 (1976).

14. See, e.g., *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 470 (Ind. 1985); *Gowing v. Great Plains Mut. Ins. Co.*, 207 Kan. 78, 82, 483 P.2d 1072, 1075 (1971); *Woodson v. Manhattan Life Ins. Co. of N.Y.*, 743 S.W.2d 835, 839 (Ky. 1987).

15. See, e.g., *Baybutt Const. Corp. v. Commercial Union Ins. Co.*, 455 A.2d 914, 921 (Me. 1983) ("... policy should be viewed from standpoint of the average ordinary person who is untrained in either the law or the insurance field . . ."), *rev'd on other grounds*, *Peerless Ins. Co. v. Brennon*, 564 A.2d 383 (Me. 1989); *Brown v. City of Laconia*, 118 N.H. 376, 378, 386 A.2d 1276, 1277 (1978) (policy interpreted from standpoint of the average layman).

may well fall within a general concept of honoring reasonable expectations, but the presence of an ambiguity is not essential to invocation of the principle articulated by Professor Keeton.¹⁶ In fact, decisions using this test solely to construe policy language do not support a new principle at all, but fall within the time-honored canon of construing ambiguities against the drafter of the contract—*contra proferentem*.¹⁷

To the contrary, the doctrine of reasonable expectations, if it involves a new principle at all, may apply without regard to any ambiguity.¹⁸ It may affect the substantive provisions of the policy, regardless of how the policy is drafted.¹⁹ Consequently, when a court states that it is employing a test involving the “reasonable expectations of the insured” to deal with ambiguous language and does not explain whether the test is limited to construction of ambiguous terms or may also be applied even where there is no ambiguity, great uncertainty may be created. Moreover, where a court’s opinion may be viewed as holding that the test involving the reasonable expectations of the insured is only a rule of construction, the application of which is limited to cases involving ambiguities,²⁰ great confusion may result. There should now be no doubt that the principle of reasonable expectations, as identified and articulated by Professor Keeton, is not merely a rule of construction and may be applied even where there is no ambiguity.²¹

IV. INVENTORY OF THE JURISDICTIONS

A. *Jurisdictions That Have Adopted the Doctrine*

Once the doctrine of reasonable expectations has been properly defined as one that can be applied to the substantive provisions of insurance policies as well as to the construction of ambiguous language, then one may begin to determine the extent to which the new principle has actually been embraced. One

16. Keeton, *Honoring Reasonable Expectations in the Interpretation of Life and Health Insurance Contracts*, *supra* note 6, at 216.

17. “Where words or other manifestations of intention bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from whom they proceed, unless their use by him is prescribed by law.” RESTATEMENT OF CONTRACTS § 236(d) (1932). See Comment, *Insurance as Contract: The Argument for Abandoning the Ambiguity Doctrine*, *supra* note 8.

18. Even though a policy may be complicated or intricately arranged does not mean it is ambiguous. It may be confusing to or beyond the comprehension of many consumers because of its wording or design, but completely intelligible to more sophisticated or discerning readers. The doctrine of reasonable expectations may apply to this situation as well as to situations where the policy is a model of clarity. Nevertheless, although confusion or unintelligibility may play a role under the doctrine, it is not a *sine qua non* for applying it. See Keeton, *Rights At Variance*, *supra* note 1, at 968.

19. Keeton, *Honoring Reasonable Expectations in the Interpretation of Life and Health Insurance Contracts*, *supra* note 6, at 217.

20. See, e.g., *Simon v. Continental Ins. Co.*, 724 S.W.2d 210 (Ky. 1987); *Woodson v. Manhattan Life Ins. Co. of N.Y.*, 743 S.W.2d 835, 839 (Ky. 1987); *Walle Mut. Ins. Co. v. Sweeney*, 419 N.W.2d 176, 181 at n.4 (N.D. 1988); *Keenan v. Industrial Indem. Ins. Co.*, 108 Wash. 2d 314, 738 P.2d 270 (1987); *St. Paul Fire & Marine Ins. Co. v. Albany County School Dist. 1*, 763 P.2d 1255 (Wyo. 1988).

21. For courts that have so ruled, see, e.g., *Continental Ins. Co. v. Bussell*, 498 P.2d 706, 710 (Alaska 1972); *Gordinier v. Aetna Cas. & Sur. Co.*, 154 Ariz. 266, 272, 742 P.2d 277, 283 (1987); *Rodman v. State Farm Mut. Auto. Ins. Co.*, 208 N.W.2d 903, 905-06 (Iowa 1973); *Sparks v. St. Paul Ins. Co.*, 100 N.J. 325, 336-39, 495 A.2d 406, 412-14 (1985).

may identify some sixteen state courts of last resort that have, in one guise or another, issued opinions that contain language stating that the doctrine of reasonable expectations as defined by Professor Keeton has been adopted. At least ten of these decisions make clear that the court understood the unique ramifications that truly make it a new development. Those opinions were rendered by the highest courts of Alabama,²² Alaska,²³ Arizona,²⁴ California,²⁵ Iowa,²⁶ Montana,²⁷ Nebraska,²⁸ Nevada,²⁹ New Hampshire,³⁰ and New Jersey.³¹ In ad-

22. *Lambert v. Liberty Mut. Ins. Co.*, 331 So. 2d 260, 263 (Ala. 1976) (interpreting Other Insurance clause in uninsured motorist coverage). See *Smith v. Auto-Owners Ins. Co.*, 500 So. 2d 1042 (Ala. 1986) (interpreting policy limits in underinsured motorist coverage).

23. *Stewart-Smith Haidinger v. Avi-Truck, Inc.*, 682 P.2d 1108 (Alaska 1984) (construing airworthiness and pilot rating certificate requirements in aircraft hull policy); *Puritan Life Ins. Co. v. Guess*, 598 P.2d 900 (Alaska 1979) (construing effect of conditional receipt in marketing life insurance); *Stordahl v. Government Emp. Ins. Co.*, 564 P.2d 63 (Alaska 1977) (construing meaning of "uninsured automobile" in uninsured motorist coverage); *INA Life Ins. Co. v. Brundin*, 533 P.2d 236 (Alaska 1975) (construing accidental death policy); *Continental Ins. Co. v. Bussell*, 498 P.2d 706 (Alaska 1972) (construing contractual liability policy); *National Indem. Co. v. Flesher*, 469 P.2d 360 (Alaska 1970) (construing duty to defend under auto liability policy).

24. *Gordinier v. Aetna Cas. & Sur. Co.*, 154 Ariz. 266, 272, 742 P.2d 277, 283 (1987) (construing "resident of same household" clause in uninsured motorist coverage); *State Farm Mut. Auto. Ins. Co. v. Bogart*, 149 Ariz. 145, 717 P.2d 449 (1986) (construing Other Insurance clause in nonowned auto coverage in auto liability policy); *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 682 P.2d 388 (1984) (resolving dispute over limits of liability coverage for lessees of insured's autos); *Zuckerman v. Transamerica Ins. Co.*, 133 Ariz. 139, 650 P.2d 441 (1982) (construing condition in fire policy that any action on a claim insured under the policy must be brought within 12 months from inception of loss).

25. *Smith v. Westland Life Ins. Co.*, 15 Cal. 3d 111, 123 Cal. Rptr. 649, 539 P.2d 433 (1975) (construing effect of conditional receipt in marketing life insurance).

26. *Farm Bureau Mut. Ins. Co. v. Sandbulte*, 302 N.W.2d 104 (Iowa 1981) (construing "ways immediately adjoining" the insured's premises provision in farm liability policy); *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169 (Iowa 1975) (construing visible marks of entry provision in burglary policy); *Rodman v. State Farm Mut. Auto Ins. Co.*, 208 N.W.2d 903 (Iowa 1973) (construing named insured exclusion under auto liability policy).

27. *Transamerica Ins. Co. v. Royle*, 202 Mont. 173, 656 P.2d 820 (1983) (alternate holding construing household exclusion clause in auto liability policy).

28. *Nile Valley Coop. Grain & Milling Co. v. Farmers Elevator Mut. Ins. Co.*, 187 Neb. 720, 193 N.W.2d 752 (1972) (construing standard fire policy).

29. *Prudential Ins. Co. of Am. v. Lamme*, 83 Nev. 146, 425 P.2d 346 (1967) (construing effect of conditional receipt in marketing life insurance). See *Sullivan v. Dairyland Ins. Co.*, 98 Nev. 364, 649 P.2d 1357 (1982) (holding it would violate insured's reasonable expectations to enforce offset provision in medical payments provision where claimant had also recovered under liability coverage of same policy); *Catania v. State Farm Life Ins. Co.*, 95 Nev. 532, 598 P.2d 631 (1979) (refusing to enforce "accidental means" language in accidental death policy citing *INA Life Ins. Co. v. Brundin*, 533 P.2d 236 (Alaska 1975), wherein the Alaska Supreme Court explicitly adopted the reasonable expectations doctrine in its broad form).

30. *Grimes v. Concord Gen. Mut. Ins. Co.*, 120 N.H. 718, 422 A.2d 1312 (1980) (deciding whether uninsured motorist benefits contained within a single policy that insured two cars may be "stacked"); *Karol v. New Hampshire Ins. Co.*, 120 N.H. 287, 414 A.2d 939 (1980) (deciding whether "all risk" policy covered damage to film caused by insured during processing); *Lariviere v. New Hampshire Ins. Group*, 120 N.H. 168, 413 A.2d 309 (1980) (construing exclusion under general liability policy issued to cover insured in building-moving business that would have eliminated coverage for injury "arising out of and occurring during the course of the movement of any building" . . .); *Storms v. United States Fidelity & Guar. Co.*, 118 N.H. 427, 388 A.2d 578 (1978) (construing whether insurer had duty to defend insured where alleged negligence took place within policy period, but bodily injury occurred after policy was cancelled); *Atwood v. Hartford Accident & Indem. Co.*, 116 N.H. 636, 365 A.2d 744 (1976) (construing completed operations exclusion in general liability policy); *Magulas v. Travelers Ins. Co.*, 114 N.H. 704, 327 A.2d 608 (1974) (construing amount of lessee-insured's loss under fire insurance policy for damage to improvements and betterments to leased premises).

31. *Werner Industries, Inc. v. First State Ins. Co.*, 112 N.J. 30, 548 A.2d 188 (1988) (whether umbrella policy "drops down" to provide coverage in the event of primary carrier's insolvency); *Sparks v. St. Paul Ins. Co.*, 100 N.J. 325, 495 A.2d 406 (1985) (construing "claims made" professional liability policy); *Perrine v. Prudential Ins. Co. of Am.*, 56 N.J. 120, 265 A.2d 521 (1970) (construing "accidental means" provision in accidental death

dition, there may be as many as six other jurisdictions that deserve to be included in this group. However, the decisions from these six jurisdictions are not entirely free from ambiguity themselves and require analysis.

In the 1970s, Pennsylvania seemed well on its way to being one of the earliest to recognize the new principle³² and subsequently was thought to be one of the states clearly to have adopted it.³³ Questions have been raised, however. The uncertainty began with the case of *Collister v. Nationwide Life Ins. Co.*³⁴ In that case, the Supreme Court of Pennsylvania was faced with the question of whether a conditional receipt created a temporary contract of insurance where its issuance was coupled with a premium payment by the applicant. It seemed clear that the court, in resolving the question, recognized the principle of reasonable expectations as applying. Not only did the court apply the principle, it also required the insurer to shoulder a heightened burden of proof on this issue:

[I]f the language of the application and conditional receipt, when so read, indicates an intent on the part of the insurer to provide interim insurance, then such benefits will be awarded by the court. That, however, is not the end of the examination. In situations where the circumstances of the transaction do not indicate that the insurer intended to provide interim insurance, but nevertheless show that the insurer accepted payment of the first premium at the time it took the application, it is then up to the insurer to establish by clear and convincing evidence that the consumer had no reasonable basis for believing that he or she was purchasing immediate insurance coverage.³⁵

Had the court stopped here, the confusion might never have arisen, but the court went on. In support of this holding, the court also reiterated a prior position that the adhesiary nature of insurance documents is such that the insured is under no duty to read the policy sent by the company, indicating that the same rule would apply to conditional receipts.³⁶ This somewhat gratuitous statement became the basis for the subsequent confusion over the doctrine in Pennsylvania.

policy); *Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 208 A.2d 638 (1965) (construing effect of conditional receipt in marketing life insurance); *Kievit v. Loyal Protective Life Ins. Co.*, 34 N.J. 475, 170 A.2d 22 (1961) (construing accident insurance policy).

32. Prior to 1970, the Supreme Court of Pennsylvania had held, albeit on the grounds that an ambiguity existed, that the use of a conditional receipt in marketing life insurance, when coupled with an initial premium payment, created a contract of insurance. *McAvoy Vitriified Brick Co. v. North American Life Assurance Co.*, 395 Pa. 75, 149 A.2d 42 (1959). The court relied on *Ransom v. Penn Mut. Life Ins. Co.*, 43 Cal. 2d 420, 274 P.2d 633 (1954) and *Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 F.2d 599 (2d Cir. 1947), *cert. denied*, 331 U.S. 849 (1947). These were life insurance marketing cases which involved conditional receipts coupled with initial premium payments and were one of the types of cases used by Professor Keeton to support his argument for recognition of a new principle of honoring reasonable expectations. See Keeton, *Rights At Variance*, *supra* note 1, at 969, 971. In *Beckham v. Travelers Ins. Co.*, 424 Pa. 107, 225 A.2d 532 (1967), the Pennsylvania Supreme Court also abandoned the distinction between "accidental means" and "accidental results," another type of case which Professor Keeton relied on in reaching his conclusion. See Keeton, *Rights At Variance*, *supra* note 1, at 976.

33. See listing of adopting states in *Davenport Peters Co. v. Royal Globe Ins. Co.*, 490 F. Supp. 286, 291 at fn.5 (1980) (opinion by Keeton, J.).

34. 479 Pa. 579, 388 A.2d 1346 (1978) *cert. denied*, 439 U.S. 1089 (1978).

35. *Id.* at 594, 388 A.2d at 1353.

36. *Id.* at 589, 388 A.2d at 1351. A similar rule had been adopted at the superior court level: "[W]here a policy is written in unambiguous terms, the burden of establishing the applicability of the exclusion or limitation involves proof that the insured was aware of the exclusion or limitation and that the effect thereof was explained to him." *Hionis v. Northern Mut. Ins. Co.*, 230 Pa. Super. 511, 517, 327 A.2d 363, 365 (1974).

Five years later, the Pennsylvania Supreme Court, while construing exclusions in a general liability policy in *Standard Venetian Blind Co. v. American Empire Ins. Co.*,³⁷ rejected the argument that the insured could avoid the effect of a clearly drafted exclusion by claiming that he or she did not know of or understand the exclusion.³⁸ The supreme court, however, went on to hold that the manifest inequality of bargaining power between an insurance company and a purchaser of insurance may justify a court's occasional deviation from the plain language of the contract. In support of the latter proposition, the court merely cited a Pennsylvania statute dealing with unconscionability.³⁹ Reference to *Collister* or the principle of reasonable expectations was conspicuously absent. Thus, one could construe *Standard Venetian Blind* as having greatly narrowed *Collister*: where there was no ambiguity in the policy, the court was justified in ignoring the language in only one instance—where the terms were unconscionable. This possibility did not go unnoticed. In a subsequent dissenting opinion, one member of the Pennsylvania Supreme Court questioned whether the doctrine of reasonable expectations had ever been adopted in Pennsylvania and, if so, whether it had survived *Standard Venetian Blind*.⁴⁰ This course of events raised some serious questions regarding the status of the doctrine in Pennsylvania, but there is more.

In 1987, the Pennsylvania Supreme Court decided *Tonkovic v. State Farm Mutual Auto Ins. Co.*,⁴¹ which involved an application for disability insurance. The insurer, after its agent had accepted the application and premium payment, unilaterally inserted into the policy an exclusion that significantly reduced the coverage specifically sought by the applicant. The evidence showed that the applicant was never informed or otherwise made aware of the change in coverage.⁴² The court distinguished *Standard Venetian Blind* on the basis that there "... the insured received precisely the coverage that he requested but failed to read the policy to discover clauses that are the usual incident of the coverage applied for."⁴³ In *Tonkovic*, where the insured did not receive the coverage for which he applied, the court reiterated the rule to which reference was made in *Collister*: "The burden is not on the insured to read the policy to discover such changes, or not read it at his peril."⁴⁴ The court then noted that this holding

37. 503 Pa. 300, 469 A.2d 563 (1983).

38. *Standard Venetian Blind Co. v. American Empire Ins. Co.*, 503 Pa. at 307, 469 A.2d at 567 (1983) (the court specifically rejected the rule announced in *Hionis* and by implication overruled the similar statement in *Collister*).

39. *Id.* at 307, 469 A.2d at 567.

40. *Gene & Harvey Builders, Inc. v. Pennsylvania Mfr's Ass'n Ins. Co.*, 512 Pa. 420, 517 A.2d 910 (1986) (Larsen, J., dissenting). Justice Larsen's dissent adopted the opinion of the trial court. The opinion of the trial court, in raising the questions regarding the status of the doctrine of reasonable expectations, did not mention *Collister v. Nationwide Life Ins. Co.*, 479 Pa. 579, 388 A.2d 1346 (1978), *cert. denied*, 439 U.S. 1089 (1978). This indicates that the court, and perhaps even the attorneys, did not consider it as having been adopted in Pennsylvania. Apparently plaintiff's counsel only argued, according to the trial court, that the doctrine was "tacitly supported" by *Sands v. Granite Mut. Ins. Co.*, 232 Pa. Super. 70, 331 A.2d 711 (1974). *Gene & Harvey Builders* at 432-33, 517 A.2d at 916.

41. 513 Pa. 445, 521 A.2d 920 (1987).

42. *Id.* at 454-55, 521 A.2d at 925.

43. *Id.*

44. *Id.*

was in accord with its decision in *Collister* and quoted extensively from the portion of that opinion that outlines the doctrine of reasonable expectations.⁴⁵ In particular, the court quoted the portion that explains that the doctrine is not merely a rule for resolving ambiguities and that it applies to all types of insurance documents, "whether they be applications, conditional receipts, riders, policies or whatever"⁴⁶ In view of these cases, how should one classify Pennsylvania?

Viewed conservatively, one could argue that the Pennsylvania decisions, at most, adopt a rather narrow application of the doctrine, one that provides relief only where in the application process the insured gets less than what was specifically promised. As will be seen below, however, getting less than what one reasonably thought one was getting is the essential element for triggering the doctrine of honoring reasonable expectations. Given the presence of that element, there appears to be no logical basis to limit application of the doctrine to the kind of fact situations found in *Collister* and *Tonkovic*. *Collister* itself goes beyond this limited notion to a degree in that the court in that case stated that the doctrine applied to situations where the circumstances of the transaction do not establish that the insurer intended to provide coverage.⁴⁷ Thus, it could be argued that the doctrine would apply in the broader way in Pennsylvania. Even where the policy clearly restricts coverage, the doctrine will apply if the insurer otherwise fosters expectations of coverage in the insured. In any event, it should be clear that Pennsylvania has adopted the doctrine, even though the extent of the application may not be clear, and for that reason it should be aligned with the ten jurisdictions listed earlier as having more clearly embraced the doctrine.

Opinions from the highest courts of Hawaii, North Carolina and Rhode Island also support the inclusion of these jurisdictions as among the states adopting the doctrine. Like the Pennsylvania experience, their adoption may not be completely free from doubt. For example, four decisions of the Supreme Court of Hawaii approved the Keeton formulation,⁴⁸ but three of these have held that the insured had no reasonable expectations under the facts of those cases.⁴⁹ This circumstance alone would not disqualify Hawaii from the list of states that have adopted the doctrine as a rule of substantive law, but when the findings of no reasonable expectations are coupled with the further circumstance that in some of the cases the quote from the Keeton formulation is closely positioned with statements that ambiguities are to be construed against

45. *Id.* at 456-57, 521 A.2d at 925-26.

46. *Id.*

47. *Collister*, 479 Pa. 579, 388 A.2d 1346 (1978), *cert. denied*, 439 U.S. 1089 (1978). See *supra* note 34 and 35 and accompanying text.

48. *Fortune v. Wong*, 68 Haw. 1, 702 P.2d 299 (1985) (upholding the motor vehicle exclusion in homeowners policy); *Hurtig v. Terminix Wood Treating & Contracting Co.*, 67 Haw. 480, 692 P.2d 1153 (1984) (holding that Exclusion (o) regarding "property damage to work performed" in comprehensive general liability policy did not apply to damage to home which was caused by termites allegedly as a result of insured's failure to correctly perform contract to inspect and treat for termites); *Hawaiian Ins. & Guar. Co. v. Brooks*, 67 Haw. 285, 686 P.2d 23 (1984) (upholding intentional harm exclusion in auto liability policy); *Sturla, Inc. v. Fireman's Fund Ins. Co.*, 67 Haw. 203, 684 P.2d 960 (1984) (upholding "business risk" exclusion in comprehensive general liability policy).

49. *Fortune*, 68 Haw. at 1, 702 P.2d at 299; *Hawaiian Ins.*, 67 Haw. at 285, 686 P.2d at 23; *Sturla*, 67 Haw. at 203, 684 P.2d at 960.

the insurer,⁵⁰ one must admit the possibility that the Hawaii court views the doctrine more as a rule of construction and may not embrace its broader, substantive application. This possibility moves closer to probability upon examination of the one case in which the court did indicate that the insured's right to enforcement of his reasonable expectations would be violated if the insurer's position were accepted.⁵¹ This decision really turned more on an interpretation of the policy language rather than on an outright refusal to honor an unambiguous term that defeated reasonable expectations. On the other hand, in none of the cases did the court actually say that the doctrine would only apply where the contract language was ambiguous. Rather, the court appeared to be adopting the doctrine in its broadest sense when it cited the Keeton formulation.⁵² Until a more definitive Hawaii opinion, therefore, there is reason to argue that Hawaii should be counted "in" rather than "out" of the list of adopting states.⁵³

North Carolina and Rhode Island provide two more examples of jurisdictions that may have adopted the doctrine of reasonable expectations, although the evidence of adoption is relatively weak. The Supreme Court of North Carolina used a test involving the insured's reasonable expectations in overruling a line of decisions in that state that had strictly enforced the requirement that notice be given to a liability insurer of the insured's involvement in an accident as soon as practicable.⁵⁴ Although the court did not cite or use the exact Keeton formulation, it was clear that the court was relieving the insured from having to comply with an unambiguous term of the policy. The court held, in line with a growing number of authorities,⁵⁵ that an unexcused delay by the insured in giving notice will not result in a policy defense unless the insurer is materially prejudiced. The Rhode Island Supreme Court also appeared to be using a test of reasonable expectations in a similar way by explaining that uninsured motorist coverages could be "stacked"⁵⁶ where separate premiums for such were paid

50. See, e.g., *Fortune*, 68 Haw. at 10, 702 P.2d at 306.

51. *Hurtig v. Terminix Wood Treating & Contracting Co.*, 67 Haw. at 481, 692 P.2d at 1154.

52. Even the dissent in *Hurtig* seems to recognize the broader implications of the doctrine. *Id.* at 485, 692 P.2d at 1156.

53. In addition to the cases cited above, in 1969 the Supreme Court of Hawaii recognized that a conditional receipt, when coupled with an initial premium payment, created a temporary contract of life insurance in *Law v. Hawaiian Life Ins. Co.*, 51 Haw. 288, 459 P.2d 195 (1969). In reaching this result, the court ignored the plain language of the receipt that required that the applicant be a "risk acceptable in the judgment of the Company under its rules, limits and standards for the plan and amount applied for at the rate of premium paid with the application." *Id.* at 291, 459 P.2d at 197. In fact, the applicant did not meet these requirements. *Id.* In doing so the court cited *Gaunt v. John Hancock Mut. Life Co.*, 160 F.2d 599 (2d Cir. 1947), *cert. denied*, 331 U.S. 849 (1947), one of the main cases relied on by Professor Keeton in recognizing the new principle. See Keeton, *Rights At Variance*, *supra* note 1, at 969.

54. *Great American Ins. Co. v. C.G. Tate Constr. Co.*, 279 S.E.2d 769 (N.C. 1981) *rev'd on other grounds*, *Great American Ins. Co. v. C.G. Tate Constr. Co.*, 315 N.C. 714, 340 S.E.2d 743 (1985) (holding unexcused but good faith delay by insured in giving notice to insurer of an accident does not relieve the insurer of its obligation to defend and indemnify unless the delay operates materially to prejudice the insurer's ability to investigate and defend, and that insurer had the burden to prove prejudice).

55. See Annotation, *Modern Status of Rules Requiring Liability Insurer to Show Prejudice to Escape Liability Because of Insured's Failure or Delay in Giving Notice of Accident or Claim, or in Forwarding Suit Papers*, 32 A.L.R. 4th 141 (1984).

56. The term "stacking" is commonly used to describe the situation where a claimant seeks to avoid the effect of Other Insurance clauses in uninsured motorist coverages by aggregating coverages in an attempt to secure complete indemnification. See R.E. KEETON & A. WIDISS, *INSURANCE LAW* § 3.11(f)(2) (1988).

on two cars covered under the same policy.⁵⁷ The effect of these opinions supports the proposition that both states have adopted the doctrine of reasonable expectations, but the lack of an explicit adoption makes for some uncertainty.

Before examining the opinions from the sixth and last jurisdiction, it should be noted that Delaware apparently has adopted a version of the reasonable expectations doctrine that is broader than a mere rule of construction, but narrower than Professor Keeton's formulation. In *Hallowell v. State Farm Mutual Auto Ins. Co.*,⁵⁸ the Delaware Supreme Court acknowledged that it had previously adopted the doctrine, but declined to extend it as far as other jurisdictions have done. The court stated that:

[W]e hold that the doctrine of reasonable expectations is applicable in Delaware to a policy of insurance only if the terms thereof are ambiguous or conflicting, or if the policy contains a hidden trap or pitfall, or if the fine print purports to take away what is written in large print.⁵⁹

One might argue that this language expresses no more than a rule of construction, particularly in view of the fact that the court went on to state that "the doctrine is not a rule granting substantive rights to an insured when there is no doubt as to the meaning of policy language."⁶⁰ However, there is another, and arguably more compelling, interpretation.

Construction of the two quotes together could lead to a conclusion that the Delaware version of the doctrine grants substantive rights where there is doubt as to the meaning of the policy even though the doubts arise from circumstances other than ambiguous language. Thus, doubts could arise from the insurer's activities in marketing the policy where particular language is emphasized in general only to find later that there is an unexpected exclusion that defeats the expectation of coverage under the particular facts, *i.e.*, "a hidden trap or pitfall." Also, there may be no conflict or ambiguity where the "fine print" qualifies the "large print" in a surprising or extraordinary way. In such circumstances, it appears that the Delaware Supreme Court will recognize rights at variance with the unambiguous language of a policy.⁶¹

The sixth jurisdiction is Colorado. In *Davis v. M.L.G. Corp.*,⁶² the Supreme Court of Colorado refused to enforce an unambiguous collision damage waiver

57. *American Universal Ins. Co. v. Russell*, 490 A.2d 60, 62 (R.I. 1985) (explaining that a prior decision involving "stacking" of uninsured motorist coverage, *Taft v. Cerwonka*, 433 A.2d 215 (R.I. 1981), rested on a holding that gave primary weight to the reasonable expectations of the insured).

58. 443 A.2d 925 (Del. 1982) (holding that uninsured motorist coverage as prescribed by the Delaware statutes does not cover accident caused by underinsured motorist).

59. *Id.* at 928.

60. *Id.* at 927.

61. Subsequent to *Hallowell*, in an unpublished opinion, the Supreme Court of Delaware stated that absent an ambiguity "there is no need, or authority, for a court to apply rules of construction which require an insurance contract to be construed in favor of the insured, or attempt to discern the reasonable expectations of the insured." *Derrickson v. American Nat'l Fire Ins. Co.*, 538 A.2d 1113 (Del. 1988) (LEXIS, Delaware Library). However, the court cited *Hallowell* as supporting this statement and gave no indication it was modifying or overruling it. *Derrickson* did involve an ambiguity and, aside from being an unpublished opinion, there does not appear to be any reason to believe the court has retrenched from the broader statements in *Hallowell*.

62. 712 P.2d 985 (Colo. 1986).

clause in a car rental agreement,⁶³ holding that the clause violated the reasonable expectations of the lessee and that the clause was unconscionable under the circumstances.⁶⁴ The court cited the original Keeton article and did not resort to any rule of construction of ambiguous language in the course of reaching its decision.⁶⁵ Although two of the justices specially concurred, expressing no opinion whether the doctrines concerning reasonable expectations and unconscionability can or should be applied to resolve other contract disputes,⁶⁶ the other four participating justices indicated the lease contract *sub judice* was like an insurance contract and should be governed by interpretive principles normally applicable to such contracts.⁶⁷ It appears, therefore, that a majority of the Colorado court would probably apply the doctrine in insurance cases given the analogy that the court drew between lease contracts and insurance policies and the court's recognition that the doctrine applied to insurance contracts. It appears, therefore, that Colorado should be included with the other fifteen adopting jurisdictions even though the Supreme Court of Colorado has yet to apply it in an insurance case.

Although, as is apparent from the foregoing discussion of the six questionable jurisdictions, one might quarrel over the exact number of states that have recognized rights of insureds at variance with policy language, it is clear that a substantial number of state courts of last resort have embraced the doctrine of reasonable expectations. Whether one argues that there are ten or sixteen is not as important as the point that the doctrine is no longer "emerging," but is, without a doubt, fully in existence. Moreover, given the status of the remaining jurisdictions, it is even clearer that the likelihood of further adoptions is very strong indeed.

B. Prospects for Further Adoptions

Almost as important as the fact that a substantial number of jurisdictions can be counted as having adopted the doctrine of reasonable expectations in its substantive form, is the fact that few courts have rejected the doctrine outright. Although there are nine states whose courts have declared that the doctrine has not been adopted,⁶⁸ only the Supreme Court of Idaho has explicitly rejected the

63. A collision damage waiver clause is a common feature of lease agreements utilized by automobile rental companies. The purpose of such a clause, when purchased by a lessee, is to relieve the lessee of liability for property damage to the leased vehicle. These clauses, however, vary among rental companies and many do not provide complete relief. See Berman & Bourne, *Renters Cope With Auto Cover Woes*, Nat'l Underwriter: Property & Casualty/Employee Benefits Ed., May 4, 1987, at 24, col. 4. In any event, these clauses have the effect of transferring the risk of loss and thereby resemble contracts of insurance. The court originally held that the waiver clause constituted a contract of insurance, but on rehearing the opinion was withdrawn and the court reserved that issue for another day. *Davis v. M.L.G. Corp.*, 712 P.2d 985, 986 (Colo. 1986).

64. *Davis*, 712 P.2d at 989-90.

65. *Id.*

66. *Id.* at 992-93.

67. *Id.* at 989, n.4.

68. Idaho: *Casey v. Highland Ins. Co.*, 100 Idaho 505, 509, 600 P.2d 1387, 1391 (1979); Illinois: *Bain v. Benefit Trust Life Ins. Co.*, 123 Ill. App. 3d 1025, 1032, 463 N.E.2d 1082, 1086 (1984); Insurance Co. of N. Am. v. Adkisson, 121 Ill. App. 3d 224, 228-29, 459 N.E.2d 310, 312-14 (1984); Massachusetts: *Bond Bros. v. Robinson*, 393 Mass. 546, 551, 471 N.E.2d 1332, 1336 (1984); North Dakota: *Walle Mut. Ins. Co. v. Sweeney*, 419 N.W.2d 176, 181, n.4 (N.D. 1988); Ohio: *Sterling Merchandise Co. v. Hartford Ins. Co.*, 30 Ohio App. 3d 131,

doctrine,⁶⁹ and even that decision was not unanimous.⁷⁰ Of the remaining eight courts, at least one has indicated it is receptive to the idea.⁷¹

The twenty-five jurisdictions that have not adopted the doctrine and that have not expressed the fact of nonadoption fall into two general categories: (1) those that have not really addressed the issue, and (2) those that have used a test involving the reasonable expectation language, but have not used language or provided other evidence that would justify a conclusion that the doctrine is merely a rule of construction, or, on the other hand, is a rule to be applied to the substance of an insurance policy without regard to the presence of ambiguous language. The cases are almost evenly split between these two categories.

135, 506 N.E.2d 1192, 1196-97 (1986); Oklahoma: *Anderson v. Continental Assurance Co.*, 666 P.2d 245, 248 (Okla. App. 1983); South Carolina: *Allstate Ins. Co. v. Mangum*, 299 S.C. 226, 231, 383 S.E.2d 464, 467 (Ct. App. 1989); Washington: *Keenan v. Industrial Indem. Ins. Co.*, 108 Wash. 2d 314, 322, 738 P.2d 270, 275 (1987); and Wyoming: *St. Paul Fire & Marine v. Albany County School Dist. 1*, 763 P.2d 1255, 1263 (Wyo. 1988).

69. *Casey*, 100 Idaho at 509, 600 P.2d at 1391 (Shepard, J., concurring in result).

In 1965, prior to the Keeton article, the Supreme Court of Oregon refused to follow the lead of California in construing an unambiguous conditional receipt as creating a contract of temporary life insurance when it was coupled with an initial premium payment. *Morgan v. State Farm Life Ins. Co.*, 240 Or. 113, 400 P.2d 223 (1965). The majority opinion characterized the principal case relied on by the insured, *Ransom v. Penn. Mut. Life Ins. Co.*, 43 Cal. 2d 420, 274 P.2d 633 (1954) as a "constructive" ambiguity case, *i.e.*, one that really did not involve an ambiguity. *Morgan*, 240 Or. at 116-17, 400 P.2d at 224-25. *Ransom* was the type of case Professor Keeton used to make his point that courts were inventing ambiguities and that traditional doctrines would not justify such a result, although he did not cite this particular case. See Keeton, *Rights At Variance*, *supra* note 1. Since three justices, in dissenting in *Morgan*, took the position that *Ransom* should be followed, one could argue that the doctrine of reasonable expectations was explicitly rejected in Oregon.

The *Morgan* case, however, was decided prior to any clear understanding that a new principle was emerging. On the other hand, Oregon has yet to explicitly adopt the doctrine. See *Lewis v. Aetna Ins. Co.*, 264 Or. 314, 505 P.2d 914 (1973) (concurring opinion relying on doctrine to find coverage under marine insurance policy). Thus, it is not clear exactly where Oregon stands on the issue, because it does not appear that the doctrine, at least by that name, has been explicitly rejected by the supreme court of that state. Oregon has been classified with those states that have not given the doctrine the type of consideration so that an informed judgment may be made as to whether the court would adopt the doctrine in any of its forms. See *infra* note 74 and accompanying text.

70. In *Corgatelli v. Globe Life & Accident Ins. Co.*, 96 Idaho 616, 533 P.2d 737 (1975), Justice Shepard authored an opinion adopting the doctrine of reasonable expectations, but Justices Donaldson and McFadden dissented, specifically refusing to adopt the doctrine. The other members of the court at that time, Chief Justice McQuade and Justice Bakes, concurred only in the conclusion reached by Justice Shepard. In *Casey*, 100 Idaho 505, 600 P.2d 1387 (1975), which was decided five years later, Justice Donaldson, now the Chief Justice, authored the opinion rejecting the doctrine of reasonable expectations as a substantive rule and was joined by Justices Bakes, McFadden and Bistline. Justice Shepherd merely concurred in the result.

For later decisions confirming that the doctrine was rejected in *Casey*, see *Meckert v. Transamerica Ins. Co.*, 108 Idaho 597, 701 P.2d 217 (1985); *Foremost Ins. Co. v. Putzier*, 102 Idaho 138, 627 P.2d 317 (1981); *Wright v. Johnson*, 101 Idaho 208, 610 P.2d 567 (1980); *Foremost Ins. Co. v. Putzier*, 100 Idaho 883, 606 P.2d 987 (1980).

71. See *Moore v. Metropolitan Property & Liab. Ins. Co.*, 401 Mass. 1010, 519 N.E.2d 265 (1988); *Lusalon, Inc. v. Hartford Accident & Indem. Co.*, 400 Mass. 767, 511 N.E.2d 595 (1987); *Massachusetts Insurers Insolvency Fund v. Continental Cas. Co.*, 399 Mass. 598, 506 N.E.2d 118 (1987); *Home Indem. Ins. Co. v. Merchants Distrib., Inc.*, 396 Mass. 103, 483 N.E.2d 1099 (1985); *Bond Bros., Inc. v. Robinson*, 393 Mass. 546, 471 N.E.2d 1332 (1984). See also Boyle, *supra* note 8.

Thirteen states fall in the second category;⁷² leaving twelve jurisdictions that either have not addressed the issue at all⁷³ or have addressed it insufficiently.⁷⁴

72. Connecticut: *Simmes v. North Am. Co. for Life & Health Ins.*, 175 Conn. 77, 394 A.2d 710 (1978) (resolving ambiguity in life insurance conditional receipt on basis of applicant's reasonable expectations, but citing authorities that support broader application); Georgia: *Richards v. Hanover Ins. Co.*, 250 Ga. 613, 299 S.E.2d 561 (1983) (wife would reasonably expect coverage and thus not barred from recovering under ambiguous homeowner's policy because of co-insured-husband's arson); Indiana: *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467 (Ind. 1985) (holding insured would reasonably expect coverage in deciding to adopt "multiple trigger" approach in determining coverage for DES-related illnesses under ambiguous provision of comprehensive general liability policy); Kansas: *Gowing v. Great Plains Mut. Ins. Co.*, 207 Kan. 78, 483 P.2d 1072 (1971) (applying reasonable expectations of insured as a rule for resolving ambiguities), *but see* *Tripp v. Reliable Life Ins. Co.*, 210 Kan. 33, 499 P.2d 1155 (1972) (holding that application for life insurance, accompanied by initial premium payment, in connection with issuance of conditional receipt creates temporary contract of insurance notwithstanding the provisions of the application and receipt to the contrary); Kentucky: *Simon v. Continental Ins. Co.*, 724 S.W.2d 210 (Ky. 1987) (employing reasonable expectations of insured as a rule of construction in resolving ambiguous underinsured motorist provision, but citing authorities that support broader application); Louisiana: *Cataldie v. Louisiana Health Service & Indem. Co.*, 456 So. 2d 1373 (La. 1984) (relying on statute prescribing cancellation clause, but also citing reasonable expectations doctrine in holding that health insurer could not refuse to pay benefits by cancelling policy after illness arose but before expenses were incurred), *but see*, *Singlemann v. Connecticut Nat'l Life Ins. Co.*, (E.D.La. 1989) (WESTLAW 145956) (noting that *Cataldie* had been legislatively overruled when the legislature amended the statute relied upon in *Cataldie*. The court made no mention of the reasonable expectations of the insured); Maine: *Baybutt Constr. Corp. v. Commercial Union Ins. Co.*, 455 A.2d 914 (Me. 1983) (holding business risk exclusion in comprehensive general liability policy was ambiguous, but also stating that objective reasonable expectations of an insured will be honored even though painstaking study of the policy provisions would have negated those expectations) *but see* *Peerless Ins. Co. v. Brennon*, 564 A.2d 383 (Me. 1989) (reversing *Baybutt* on the point that the comprehensive general liability policy was ambiguous); Michigan: *Powers v. Detroit Auto. Inter-Ins. Exchange*, 427 Mich. 602, 398 N.W.2d 411 (1986) (Williams, C.J., applying doctrine of reasonable expectations to auto liability policy provisions that were less than clear at best and ambiguous at worst, but acknowledging that an ambiguity was not a prerequisite to the application of the doctrine, with one justice concurring in the opinion, two justices concurring in result, and three justices concurring in part and dissenting in part); Minnesota: *Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co.*, 366 N.W.2d 271 (Minn. 1985) (Wahl, J., with whom two justices concurred, adopted reasonable expectations doctrine without regard to ambiguities in construing "visible marks of entry" requirement in burglary policy, but four justices, in concurring specially, believed an ambiguity was present and would limit applicability of doctrine to such situations); Mississippi: *Brown v. Blue Cross & Blue Shield of Miss.*, 427 So. 2d 139 (Miss. 1983) (in refusing, on public policy grounds, to enforce cancellation clause that would deny benefits for expenses incurred after cancellation even though illness or condition occurred during policy period, citing *Keeton, Rights At Variance*, *supra* note 1, in support of holding); New Mexico: *Thompson v. Occidental Life Ins. Co. of Calif.*, 90 N.M. 620, 567 P.2d 62 (1977) (dissenting opinion arguing that court had previously adopted doctrine of reasonable expectations without regard to ambiguities in *Pribble v. Aetna Life Ins. Co.*, 84 N.M. 211, 501 P.2d 255 (1972)), *but see* *Daivon v. Business Men's Assurance Co. of Am.*, 85 N.M. 796, 518 P.2d 776 (1974) (treating *Pribble* as limiting doctrine to a rule of construction where ambiguity exists); Baker v. Armstrong, 106 N.M. 395, 744 P.2d 170 (1987) (using test of reasonable expectations as a rule of construction); West Virginia: *National Mut. Ins. Co. v. McMahon & Sons*, 356 S.E.2d 488 (W. Va. 1987) (adopting reasonable expectations as rule of construction to resolve ambiguities), *but see* *Romano v. New England Mut. Life Ins. Co.*, 362 S.E.2d 334, 336 (W. Va. 1987) (holding that promotional materials for group life insurance created reasonable expectation of coverage which would be honored despite language in master contract excluding coverage where employee not "actively at work"); and Wisconsin: *Garriguenc v. Love*, 67 Wis. 2d 130, 226 N.W.2d 414 (1975) (the first in a long line of cases adopting the doctrine as a rule of construction), *but see* *Gross v. Lloyds of London Ins. Co.*, 121 Wis. 2d 78, 358 N.W.2d 266 (1984) (wherein it was noted by Abrahamson, J., in a concurring opinion, that the doctrine of reasonable expectations may be used as a rule of construction or as a substantive rule. The opinion then pointed out that the court is not clear on how it is using the doctrine in holding that the insurer has a duty to continue to defend even though the policy states otherwise where policy limits are exhausted).

73. Research has not revealed any case involving the issue that has reached the highest courts of Arkansas, Florida, and Tennessee.

74. In nine jurisdictions the doctrine was not given the type of consideration so that an informed judgment may be made as to whether the court has or would adopt the doctrine in any of its forms. Maryland is included in this category, *but see* *Government Employers Ins. Co. v. Ropka*, 74 Md. App. 249, 267, 536 A.2d 1214, 1223 (1988) (without discussing the doctrine or citing authorities adopting it, the court held that the insured has the

Although the number of adoptions is impressive, one may also conclude from some cases discussed above that there remains some ambivalence towards

right to expect that renewal policy will be substantially the same as expiring policy because this rule of law is "consonant with the reasonable expectations of an insured").

Missouri sidestepped the issue by concluding that the application of the doctrine would be inappropriate in the particular case because the contract involved a group insurance policy and the court said it was not a contract of adhesion since it was negotiated by the employer. *Robin v. Blue Cross Hosp. Serv., Inc.*, 637 S.W.2d 695 (Mo. 1982), but see *Estrin Constr. Co. v. Aetna Cas. & Sur. Co.*, 612 S.W.2d 413 (Mo. App. 1981) (adopting the doctrine without regard to ambiguities but holding that exclusion in question did not defeat insured's reasonable expectations).

New York occupies a rather anomalous position since Professor Keeton relied on two early cases from that jurisdiction, *Lachs v. Fidelity & Cas. Co. of N.Y.*, 306 N.Y. 357, 118 N.E.2d 555 (1954) (involving marketing methods of air-travel trip insurance) and *Burr v. Commercial Travelers Mut. Accident Ass'n*, 295 N.Y. 294, 67 N.E.2d 248 (1946) (refusing to make a distinction between accidental "means" and "result" in accident policy), as the basis for arguing that a new principle honoring rights at variance with insurance contracts had emerged. See Keeton, *Rights At Variance*, *supra* note 1, 970, 976. Nevertheless, the New York Court of Appeals has never embraced the doctrine as articulated by Professor Keeton.

Oregon may also be included in this category, see discussion *supra* note 69.

South Dakota is also included here because, even though two dissenting justices of the supreme court have argued for adoption of the doctrine, the majority did not discuss the issue. See *Grandpre v. Northwestern Nat'l Life Ins. Co.*, 261 N.W.2d 804 (S.D. 1977). See also *American Hardware Mut. Ins. Co. v. Tri-State Mut. Ins. Co.*, 276 N.W.2d 264 (S.D. 1979) (dissent arguing for application of doctrine, apparently as rule of construction).

There are two cases in Texas that should be mentioned, but the doctrine was not sufficiently considered in either. See *Kulubis v. Texas Farm Bureau Underwriters*, 706 S.W.2d 953 (Tex. 1986) (court held illegal destruction of jointly owned property by one coinsured does not bar recovery by an innocent coinsured because, *inter alia*, latter would reasonably expect to be covered); *Republic Nat'l Life Ins. Co. v. Heyward*, 536 S.W.2d 549 (Tex. 1976) (court rejects distinction between accidental "means" and "result," a type of case relied on by Professor Keeton as basis for arguing that new principle had emerged).

The Utah Supreme Court held that failure of the insurer to call the insured's attention to the existence of a household exclusion clause in an auto liability policy rendered the exclusion void because "[w]ithout disclosure the household exclusion clause fails to 'honor the reasonable expectations' of the purchaser," *Farmers Ins. Exch. v. Call*, 712 P.2d 231, 237 (Utah 1985), but subsequently held in a 4 to 1 decision that the exclusion was enforceable with respect to policy amounts in excess of the statutory minimum required amount, apparently deeming delivery of the policy as providing the required notice to the insured, *State Farm Mut. Auto. Ins. Co. v. Mastbaum*, 748 P.2d 1042 (Utah 1987) (dissent arguing for adoption of reasonable expectations doctrine). See also *Williams v. First Colony Life Ins. Co.*, 593 P.2d 534 (Utah 1979); *Long v. United Benefit Life Ins.*, 29 Utah 2d 204, 507 P.2d 375 (1973); *Prince v. Western Empire Life Ins. Co.*, 19 Utah 2d 174, 428 P.2d 163 (1967) (all dealing with the use of conditional receipts in marketing life insurance, but not explicitly adopting doctrine of reasonable expectations).

Two cases were decided by the Vermont Supreme Court in 1987 that touch on the issue, but are inconclusive regarding that court's attitude toward the doctrine. In *Sanders v. St. Paul Mercury Ins. Co.*, 148 Vt. 496, 512, 536 A.2d 914, 921 (1987), the court rejected arguments that an unambiguous "anti-stacking" provision in the uninsured motorist coverage was either unconscionable or violated the reasonable expectations of the insured under the facts of the case, pointing out that "[i]n the final analysis a policy meets the consumer's expectations if the issuer complies with statutory requirements in every respect." In *Val Preda Leasing, Inc. v. Rodriguez*, 149 Vt. 129, 131, 540 A.2d 648, 652 (1987), the court held that the limitations on the collision damage waiver provision in an auto rental agreement were "substantively unfair" and that they "significantly restrict the rental company's limitation on the renter's liability for damage to the vehicle in an unexpected and unconscionable manner." (Emphasis added). The court discussed the Colorado decision in *Davis v. M.L.G. Corp.*, 712 P.2d 985 (Colo. 1986), but, unlike the court in *Davis*, made no analogy to insurance contracts.

The Supreme Court of Virginia, in deciding whether punitive damages were covered under a liability policy, stated that one line of cases construed the policy language in question to include punitive damages based on the reasonable expectations of the insured. See *United Services Auto Ass'n v. Webb*, 235 Va. 655, 369 S.E.2d 196 (1988). The *Webb* court, however, held that the policy language was ambiguous and construed it in favor of the insured without referring to the reasonable expectations of the insured. *Id.* at 658, 369 S.E.2d at 199. Moreover, the court cited *Lazenby v. Universal Underwriters Ins. Co.*, 214 Tenn. 639, 383 S.W.2d 1 (1964) in support of its holding. However, *Lazenby* did not consider the applicability of the doctrine of reasonable expectations. The case was decided before the doctrine had been recognized. At most, *Lazenby* is simply a case of construing ambiguities against the insurer and did not address the doctrine as it is understood today.

adopting the doctrine. That may well be, considering the confusion over the scope of the doctrine as it has evolved from a principle to full-blown doctrine, *i.e.*, a body of law from which particular cases can be readily resolved. Such ambivalence is inherent in the common law where all "doctrines" were once exceptions or accretions to other doctrines that have emerged to take on lives of their own. Doctrines do not generally spring full-blown from any one case, or for that matter from a single law review article, but must await development by means of the fortuities of litigation.

Dean Leon Green, in commenting on the growth and development of the common law, made an observation several years ago that is equally apt today:

What is startling, and only because of its rarity, in cases of serious departure from an old principle or of recognition of a new one, is for a court to put its finger on the particular policy relied upon. Here the courts are inclined to talk in terms of the broadest generalities, or in terms of legal doctrines which in themselves make no disclosure. If disagreement is likely as to the policy that should control a decision, the courts perhaps are justifiably hesitant about pinpointing it with precision, for policy normally casts its shadow long before it takes definite form.⁷⁵

The shadow of the doctrine of reasonable expectations and its underlying policy justifications were cast over twenty years ago. Insurance contracts are generally contracts of adhesion—standardized forms that by definition present little opportunity for negotiation. In the aggregate they embody a system of risk distribution—a system that is essential to societal advancements. Yet as individual contracts, they are rarely read by consumers, and even when read their ramifications are not sufficiently understood. Coverage as to the paradigm fact pattern that gives rise to loss, along with the "dickered terms," may be appreciated, but seldom does the average consumer have the experience and background to appreciate the limitations for fact patterns that fall within the penumbral areas. Courts, consequently, have exercised a more active role in resolving disputes under these contracts and, in doing so, the underlying policy considerations have produced a new body of law—first in the form of a principle and ultimately as a doctrine. This process, as Dean Green points out, is the essence of the common law. Although at any one time there may be unanswered questions about the application of any doctrine, this residuum of uncertainty does not mean there are no guidelines at all.

Although the form of the doctrine of reasonable expectations may not be fully fixed yet in all jurisdictions, and may never be, a doctrinal core has been identified by some of the courts that have viewed the doctrine as creating rights at variance with unambiguous policy language. As a consequence, one may predict with considerable confidence that courts in the remaining jurisdictions will recognize these developments and that any confusion over the nature of the doctrine itself will rapidly dissipate. An examination of the current status of the doctrine provides ample support for these conclusions.

75. Green, *The Study and Teaching of Tort Law*, 34 TEX. L. REV. 1, 15 (1955).

V. CURRENT STATUS OF THE DOCTRINE

A. *A Re-examination of the Early Doctrinal Limitations*

As previously noted,⁷⁶ Professor Keeton drew on a wide variety of cases in identifying the nascent principle that has come to be known as the doctrine of reasonable expectations. Although the formulation of the principle⁷⁷ was concise, it remained tantalizingly vague, in some ways more interesting for what it did not say than for what it did say. Nevertheless, what was conveyed should not be minimized as it provided important doctrinal limitations. Initially the reader is informed that not every expectation will be honored, but only those that are judged to be reasonable by some objective standard. Did this mean only that the reasonableness of the asserted expectation must be judged by what an ordinarily prudent insured would have expected, as contrasted to a standard that, in essence, turns on the good faith of the assertion by the particular insured? If the former, does it mean that the insured must introduce extrinsic evidence regarding the policy or some activity attributable to the insurer which could be judged as reasonably fostering an expectation of coverage?

The requirement that the expectation have an objective basis indicates, at the very least, that any expectation that is idiosyncratic would not be reasonable, but it also goes further. It seems to require that there be some evidentiary basis beyond naked belief on the part of the person seeking coverage, *i.e.*, that it be objectively determinable. The requirement that the expectation be objectively determinable implies that there must be evidence of obfuscating factors that could lead a reasonable insured to believe, for example, that a loss would be covered even though the policy actually excludes the loss. The facts leading to the confusion could consist of overly complex or technical policy language. This possibility was apparently recognized in that aspect of the principle that provided for its application when the policy could be understood only through a very careful perusal. In such circumstances, even though it was possible to understand the policy, an insured reasonably might expect coverage because the exclusion or lack of coverage could be understood only through a "painstaking study," a study that a reasonable insured would not be expected to undertake.

On the other hand, the formulation was not apparent as to what would happen if the policy could be understood without such a study. It did not preclude the recognition that an expectation could still be objectively reasonable even in the face of a simple and clearly worded policy provision. Where the circumstances or factors could cause a reasonable insured to be ignorant of the provision or, where the insured knows of the provision, but a reasonable insured could believe the provision would not apply because of some obfuscating fact, the doctrine may also apply. Thus, if the early formulation was incomplete, it was only because it did not identify all the possible fact situations that would meet the requirement that the expectation be objectively determinable. In short, the formulation carefully accounted for the extant case law and its various fact

76. See *supra* note 1 and accompanying text.

77. See *supra* note 10 and accompanying text.

situations, but provided incomplete guidance as to new factual situations to which it might apply. Moreover, there did not appear to be any self-evident, common substantive factors running through these cases other than the requirement that the expectation be objectively determinable, as discussed above.

The fact that most modern insurance contracts have been, in many respects, contracts of adhesion, and most likely have not been read or understood provided the basis for arguing that the written application or insurance policy should not always be the last and only word as to the insurer's obligation.⁷⁸ Because there is no knowing agreement on the insured's part as to much of the contract and because the lack of understanding is justified, the orthodox rules of contract law need not be applied rigidly. On the contrary, courts, as Professor Keeton so persuasively demonstrated, regularly were taking into account matters not included in traditional contract doctrines in the course of adjusting the relationship memorialized in writing between the parties.

Not surprisingly, this practice was viewed as an untoward development by the insurance industry, particularly since there appeared to be no clear boundaries to the application of the new development.⁷⁹ For example, some of the earliest cases involved the sale of life insurance.⁸⁰ Although a careful reading of a conditional receipt issued upon application for life insurance would reveal that the insurer had no intention to provide coverage before the application was approved, a number of courts held that a temporary contract of insurance came into existence if the application was accompanied by an initial payment of premium.⁸¹ Although there may have been no ambiguity in the writings, the courts sided with the applicant, or the beneficiary, in holding that under these circumstances the applicant had a reasonable expectation of immediate coverage. The expectation was reasonable because there was no other apparent reason that was sufficient for the requirement that the premium payment be made at that stage of the process. The fact that the insurer could demonstrate that the applicant would benefit in some ways under this marketing process, even without the immediate coverage,⁸² was not enough to overcome the obfuscating factor—requirement of premium payment prior to approval of the application. The expectation of immediate coverage had to be negated specifically by the insurer

78. Keeton, *Rights At Variance*, *supra* note 1 at 966-68. See also Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, *supra* note 8 at 530.

79. See, e.g., Squires, *supra* note 7.

80. The earliest life insurance marketing case most often cited as foreshadowing the principle of reasonable expectations is *Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 F.2d 599 (2d Cir. 1947), *cert. denied*, 331 U.S. 849 (1947). See also *Ransom v. Penn Mut. Life Ins. Co.*, 43 Cal. 2d 420, 274 P.2d 633 (1954); *Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 208 A.2d 638 (1965); *Prudential Ins. Co. v. Lamme*, 83 Nev. 146, 425 P.2d 346 (1967).

81. All of the cases in the immediately preceding footnote came to this conclusion.

82. The possible benefits were outlined in *Gaunt*, 160 F.2d at 601:

(1) The policy would sooner become incontestable. (2) It would earlier reach maturity, with a corresponding acceleration of dividends and cash surrender. (3) It would cover the period after "approval" and before "issue." (4) If the insured became uninsurable between "completion" and "approval" it would still cover the risk. (5) If the insured's birthday was between "completion" and "approval," the premium would be computed at a lower rate. (6) When the policy covers disability, the coverage dates from "completion."

in a straightforward manner capable of being proved in court.⁸³ Perhaps such negation could be made by explicitly notifying the applicant of the fact that there was no immediate coverage,⁸⁴ notification that was generally manageable by the insurers because the application was usually solicited in person by an agent of the insurer. In any event, had the courts merely applied the doctrine of reasonable expectations to life insurance marketing cases, there may have been no reason for insurers to worry. However, insurers did begin to worry, and they had good reason.

Although negation of the applicant's expectations may be manageable in a marketing situation where the soliciting agent frequently is in direct personal contact with the applicant, similar results in favor of insureds were being reached in other insurance marketing situations where the obfuscation had to do with coverage provisions within the actual insurance contract,⁸⁵ as contrasted to misunderstandings created by the particular application process. Moreover, other early cases made plain that enforceable expectations could be created at any time in the course of the insurance relationship⁸⁶ and not just at inception.⁸⁷ Some assertions of expectations recognized by the courts even had an *ad hoc* quality to them,⁸⁸ making it even more difficult to predict to what circumstances the doctrine would apply because an obfuscating factor raising a reasonable expectation of coverage could now be identified at any stage of the insurance relationship. Nevertheless, despite the warnings of some critics,⁸⁹ the doctrine has not been applied with abandon. This cautious application is probably attributable to the conservative manner in which the doctrine has developed.

83. Several of the early cases indicated that the insurer must make the effect of the conditional receipt unequivocally clear to the applicant if the insurer expected to prevail in court. *See, e.g., Gaunt*, 160 F.2d at 601; *Ransom*, 43 Cal. 2d at 425, 274 P.2d at 636; *Prudential Ins. Co.*, 83 Nev. at 149, 425 P.2d at 348.

84. *See Keeton, Honoring Reasonable Expectations in the Interpretation of Life and Health Insurance Contracts*, *supra* note 6 at 218. *See also* R. KEETON & A. WIDISS, *INSURANCE LAW* § 6.3(c)(1) (1988).

85. Two early cases involved the marketing of air-travel trip insurance through vending machines at airports. The courts refused to enforce policy restrictions that eliminated coverage while the insured was traveling on certain types of aircraft. *See Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 27 Cal. Rptr. 172, 377 P.2d 284 (1962); *Lachs v. Fidelity & Cas. Co. of N.Y.*, 306 N.Y. 357, 118 N.E.2d 555 (1954).

86. *See, e.g., Kievit v. Loyal Protective Life Ins. Co.*, 34 N.J. 475, 170 A.2d 22 (1961) (interpreting meaning of "accidental bodily injuries" under accident policy); *Gerhardt v. Continental Ins. Cos.*, 48 N.J. 291, 225 A.2d 328 (1966) (deciding whether homeowners policy provided coverage for a worker's compensation claim).

87. *Harr v. Allstate Ins. Co.*, 54 N.J. 287, 255 A.2d 208 (1969) (oral representation by insurer's agent, after inception of policy, that insured would be "fully covered" created reasonable expectation of coverage despite specific exclusion in policy for loss in question).

88. It would be reasonable for the applicant, and any prospective beneficiary that knew of the application, for life insurance to have a general understanding that coverage was effective from the time the premium was paid, but it is more difficult to assume that a purchaser of property insurance would be conversant with all the different risks covered under that type of policy and have formed an expectation of coverage for each of the risks involved. The expectation would arise only after the loss resulted from the specific fact situation which in many instances would not be contemplated. For example, it would be somewhat incredulous to assume that a homeowner would have actually thought about the potential liability for such a risk as a workers' compensation claim by a domestic employee and whether that risk was covered under a homeowners policy. *See Gerhardt*, 48 N.J. at 291, 225 A.2d at 328.

89. *See, e.g., Anderson, Reasonable Expectations and Insurance Contracts: What Should We Reasonably Expect from Judges*, *supra* note 7; *Gardner, supra* note 7; *Squires, supra* note 7.

B. Doctrinal Developments

Although at least a score of jurisdictions have adopted the doctrine of reasonable expectations over the last twenty years,⁹⁰ the more significant substantive developments in the doctrine have occurred in two states—first Iowa and then Arizona. It is doubtful that either of these jurisdictions would have readily come to mind in 1970 as the predicted source of these developments. New Jersey would have been a more logical choice as a good number of the cases foreshadowing the doctrine arose in that jurisdiction.⁹¹ Another logical choice might have been California, given the leadership role its courts had played in common law developments in the decades after World War II⁹² and the fact that the ground work for further developments in the doctrine of reasonable expectations had been laid in several early cases.⁹³ Be that as it may,⁹⁴ the more

90. See *supra* notes 22-67 and accompanying text.

91. See *Harr v. Allstate Ins. Co.*, 54 N.J. 287, 255 A.2d 208 (1969); *Gerhardt v. Continental Ins. Cos.*, 48 N.J. 291, 225 A.2d 328 (1966); *Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 208 A.2d 638 (1965); *Kievit v. Loyal Protective Life Ins. Co.*, 34 N.J. 475, 170 A.2d 22 (1961).

92. The court was particularly active in tort law development. For example, see *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952) (recognizing a cause of action for intentional infliction of emotional distress); *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (recognizing strict liability in tort for defective products); *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (abandoning the common law distinctions among various classes of entrants on real property and adopting a standard of reasonable care); *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (recognizing a cause of action for negligent infliction of emotional distress to a bystander parent where a child is injured even though the parent was not physically impacted or in the zone of danger).

93. See *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966); *Steven v. Fidelity & Cas. Co. of N.Y.*, 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962); *Ransom v. Penn. Mut. Life Ins. Co.*, 43 Cal. 2d 420, 274 P.2d 633 (1954).

94. There have been a number of decisions in New Jersey involving the principle of reasonable expectations, sometimes where there was an ambiguity and other times not, but they have added little in the way of doctrinal advancements. See *Werner Indus., Inc. v. First State Ins. Co.*, 112 N.J. 30, 548 A.2d 188 (1988) (whether excess policy "dropped down" upon insolvency of primary carrier, no ambiguity involved); *Meire v. New Jersey Life Ins. Co.*, 101 N.J. 597, 503 A.2d 862 (1986) (whether life insurance policy had been terminated, ambiguity involved); *Sparks v. St. Paul Ins. Co.*, 100 N.J. 325, 495 A.2d 406 (1985) (coverage of "claims made" professional liability policy, no ambiguity involved); *Zuckerman v. National Union Fire Ins. Co.*, 100 N.J. 304, 495 A.2d 395 (1985) (coverage of "claims made" professional liability policy, no ambiguity involved); *Gottfried v. Prudential Ins. Co. of Am.*, 82 N.J. 478, 414 A.2d 544 (1980) (construing meaning of "accidental bodily injuries," no ambiguity involved); *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 405 A.2d 788 (1979) (construing "business risk" exclusion in comprehensive general liability policy, no ambiguity involved); *Fenwick Machinery, Inc. v. A. Tomae & Sons, Inc.*, 79 N.J. 590, 401 A.2d 1087 (1979) (whether contractor's equipment floater policy covered damage to unscheduled equipment leased to insured, no ambiguity involved); *DiOrio v. New Jersey Mfrs. Ins. Co.*, 79 N.J. 257, 398 A.2d 1274 (1979) (whether vehicle was furnished for regular use of insured under nonowned auto coverage, no ambiguity involved); *Bryan Constr. Co. v. Employers' Surplus Lines Ins. Co.*, 60 N.J. 375, 290 A.2d 138 (1972) (whether umbrella policy covered losses not covered by underlying policies, ambiguity involved); *Perrine v. Prudential Ins. Co. of Am.*, 56 N.J. 120, 265 A.2d 521 (1970) (construing "accidental means" test in accident policy, no ambiguity involved).

California has produced one significant case. *Smith v. Westland Life Ins. Co.*, 15 Cal. 3d 111, 539 P.2d 433, 123 Cal. Rptr. 649 (1975). The California Supreme Court held that, not only did the use of a conditional receipt coupled with an initial premium payment by an applicant for life insurance create a temporary contract of insurance in the absence of actual notice to the applicant that there would be no temporary coverage, but the coverage would stay in effect until the applicant was notified that the application had been rejected and the applicant received a refund of the premium. This case, however, did not add anything to the state of the doctrinal art that was not already known from such prior cases as *Prudential Ins. Co. of Am. v. Lamme*, 83 Nev. 146, 425 P.2d 346 (1967) and *Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 208 A.2d 638 (1965). For other California cases involving the doctrine of reasonable expectations, but without any material doctrinal amplification, see *White v. Western Title Ins. Co.*, 40 Cal. 3d 870, 710 P.2d 309, 221 Cal. Rptr. 509 (1985) (title insurance construed in

substantive developments have come from courts that recognized the doctrine for the first time only during the last two decades.

Iowa first acknowledged the existence of the doctrine in 1973 in *Rodman v. State Farm Mutual Auto Ins. Co.*,⁹⁵ a case in which the insured had not read the policy and was unaware that it contained a provision excluding liability coverage for bodily injury to the insured or any resident relative of the insured's household. The insured testified that he would not have purchased the policy had he known of the exclusion. The court, however, decided that the doctrine should not be extended to situations where an ordinary layman would not misunderstand the coverage from a reading of the policy in the absence of other circumstances attributable to the insurer which would foster coverage expectations.⁹⁶ The court did not elaborate on what the "other circumstances" might be beyond an indication that they would include insurance company conduct when the policy was issued.⁹⁷ This position was not new, as the early life and air-travel trip insurance cases from other jurisdictions demonstrated. Several such cases found coverage where insurer actions during the marketing process fostered reasonable expectations.⁹⁸ Thus, the doctrine had a rather modest beginning in Iowa, but there was more to come.

The Iowa Supreme Court had the opportunity to apply the doctrine again several years later and on that occasion the court was more definite as to its doctrinal aspects. In 1975 the court, in deciding *C & J Fertilizer, Inc. v. Allied Mutual Ins. Co.*,⁹⁹ had before it a situation where the insured specifically requested coverage for burglary, but unbeknownst to him the policy defined burglary in a peculiar way. The definition excluded coverage of any occurrence

accordance with reasonable expectations of insured and public); *Searle v. Allstate Life Ins. Co.*, 38 Cal. 3d 425, 696 P.2d 1308, 212 Cal. Rptr. 466 (1985) (meaning of "suicide, sane or insane" exclusion of life insurance policy); *Reserve Ins. Co. v. Pisciotto*, 30 Cal. 3d 800, 640 P.2d 746, 180 Cal. Rptr. 628 (1982) (whether step-son was a "family" member for purpose of exclusion in watercraft liability policy, ambiguity involved); *Signal Cos. v. Harbor Ins. Co.*, 27 Cal. 3d 359, 612 P.2d 889, 165 Cal. Rptr. 799 (1980) (doctrine of reasonable expectations not applicable where contract is between two insurers); *Insurance Co. of N. Am. v. Sam Harris Constr. Co.*, 22 Cal. 3d 409, 583 P.2d 1335, 149 Cal. Rptr. 292 (1978) (meaning of "occurrences or accidents" during policy period, ambiguity involved); *National Ins. Underwriters v. Carter*, 17 Cal. 3d 380, 551 P.2d 362, 131 Cal. Rptr. 42 (1976) (construing term "insured" under aircraft liability policy); *Gyler v. Mission Ins. Co.*, 10 Cal. 3d 216, 514 P.2d 1219, 110 Cal. Rptr. 139 (1973) (construing "claims made" professional liability policy, ambiguity involved); *Thompson v. Occidental Life Ins. Co. of Cal.*, 9 Cal. 3d 904, 513 P.2d 353, 109 Cal. Rptr. 473 (1973) (construing conditional receipt in marketing life insurance, ambiguity involved); *Wint v. Fidelity & Cas. Co. of N.Y.*, 9 Cal. 3d 257, 507 P.2d 1383, 107 Cal. Rptr. 175 (1973) (construing "business pursuit" exclusion in homeowners policy, ambiguity involved); *Century Bank v. St. Paul Fire & Marine Ins. Co.*, 4 Cal. 3d 319, 482 P.2d 193, 93 Cal. Rptr. 569 (1971) (construing Banker's Blanket Bond where forged documents were used to secure loan); *Hogan v. Midland Nat'l Ins. Co.*, 3 Cal. 3d 553, 476 P.2d 825, 91 Cal. Rptr. 153 (1970) (whether term "accident" in general liability policy covered expenses which resulted from a third party having to overcompensate for a saw manufactured by insured that failed to cut lumber in proper widths); *Herzog v. National American Ins. Co.*, 2 Cal. 3d 192, 465 P.2d 841, 84 Cal. Rptr. 705 (1970) (construing "ways immediately adjoining" premises language in homeowners policy).

95. 208 N.W.2d 903 (Iowa 1973).

96. *Id.* at 908.

97. *Id.*

98. See *Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 F.2d 599 (2d Cir. 1947), cert. denied, 331 U.S. 849 (1947); *Ransom v. Penn Mut. Life Ins. Co.*, 43 Cal. 2d 420, 274 P.2d 633 (1954); *Prudential Ins. Co. of Am. v. Lamme*, 83 Nev. 146, 425 P.2d 346 (1967). See also *Steven v. Fidelity & Cas. Co. of N.Y.*, 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962); *Lachs v. Fidelity & Cas. Co. of N.Y.*, 306 N.Y. 357, 118 N.E.2d 555 (1954).

99. 227 N.W.2d 169 (Iowa 1975).

which was not evidenced by visible marks of entry on the exterior of the premises at the point of entry.¹⁰⁰ Under the facts of the case there was considerable physical evidence inside the building that a burglary had occurred, but there were no visible marks of entry on the exterior of the building. This circumstance did not negate the fact that a burglary had occurred because it was possible to force open one of the exterior doors, even though it was locked, without causing physical damage or otherwise leaving marks.¹⁰¹ Although there was testimony that the insurer's agent informed the insured there had to be visible evidence of burglary to recover under the policy, there was no testimony that the insured was ever informed or knew that the evidence must consist of visible marks of entry on the exterior of the premises at the place of entry.¹⁰²

As background for its decision, the court reviewed a number of authorities describing the modern revolution in the manner of formation of contractual relationships and the proliferation of standard form contracts.¹⁰³ The court went on to quote approvingly from what was to become section 211 (at that time denominated as section 237)¹⁰⁴ of the Restatement (Second) of Contracts. In fact, the court equated the doctrine of reasonable expectations that had developed under insurance law with the test that the American Law Institute was in the process of formulating as an exception to the general rule regarding enforceability of standardized agreements.¹⁰⁵ The thrust of the rule under section 211 is that standardized written agreements will be enforced without regard to knowledge or understanding of the standard terms where a party to such an agreement has reason to believe that like writings are regularly used to embody terms of the same type.¹⁰⁶ The rule, however, is qualified by an exception. Where the other party, the insurer in our case, has reason to believe that the party manifesting such assent, the insured, would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.¹⁰⁷ The American Law Institute had come to the conclusion that a number of cases

100. *Id.* at 171.

101. *Id.*

102. *Id.*

103. *Id.* at 173-76.

104. Section 237 of the first Restatement of Contracts stated the parole evidence rule. In the initial draft of the second Restatement, section 237 dealt with the legal effects of standardized agreements. RESTATEMENT (SECOND) OF CONTRACTS, § 237 (Tent. Draft No. 5, 31, 1970). This section was later renumbered and adopted as section 211 of the final draft of the Restatement (Second) of Contracts. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

105. *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d at 176.

106. Section 211. Standardized Agreements

(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.

(2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.

(3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

107. *Id.*

construing form contracts had recognized an exception and that these cases had to be accounted for in the revised Restatement of Contracts.

Although section 211 does not itself define what constitutes "reason to believe," the comments elaborate on this point. In an attempt to clarify the application of the exception in *C & J Fertilizer*, the Iowa court quoted from the comment:

Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation. A debtor who delivers a check to his creditor with the amount blank does not authorize the insertion of an infinite figure. Similarly, a party who adheres to the other party's standard terms does not assent to a term if the other party has reason to believe that the adhering party would not have accepted the agreement if he had known that the agreement contained the particular term. Such a belief or assumption may be shown by the prior negotiations or inferred from the circumstances. Reason to believe may be inferred from the fact that the term is bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction. The inference is reinforced if the adhering party never had an opportunity to read the term, or if it is illegible or otherwise hidden from view. This rule is closely related to the policy against unconscionable terms and the rule of interpretation against the draftsman.¹⁰⁸

This comment provided the rationale for the court's refusal to enforce the policy definition of burglary. The court said that the insured was not aware of the definition of burglary, that the definition was inconsistent with either a lay or legal concept of the crime, and that the definition defeated the dominant purpose of purchasing the policy.¹⁰⁹ It, in effect, eviscerated the coverage specifically bargained for, *i.e.*, protection against burglary.

The *C & J Fertilizer* opinion was a very important development in several respects. First, it incorporated in an insurance case the doctrinal underpinnings of the American Law Institute's exception to the general rule of enforceability of standardized agreements. Thus, insurance contracts, like other standardized agreements, would be enforced as written, even though not read or understood, unless the insurer had "reason to believe" that the insured would not have assented to the term. Moreover, the comments to section 211 adopted by the court provided some long needed generalizations beyond the specific holdings on the facts of the supporting cases when they described some of the obfuscating factors that would be recognized as fostering enforceable expectations on the part of an insured. Lastly, the opinion lent legitimacy to the doctrine of reasonable expectations in insurance law by identifying it as a doctrine that was recognized and supported by the American Law Institute.¹¹⁰ Having been stamped with the imprimatur of that prestigious organization, the doctrine could hardly be viewed

108. *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d at 176 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 211 comment f at 540-41 (1981)).

109. *Id.* at 176-77.

110. The American Law Institute clearly contemplated that insurance transactions were within the purview of section 211 at the time it was drafted. The Reporter's Note cites the Keeton article, among others, and a number of the cases discussed in the article in support of the new section and the exception to it. RESTATEMENT (SECOND) OF CONTRACTS § 211 at 124 (1981).

as unorthodox. This opinion made a major contribution to the development of the doctrine of reasonable expectations.

The Supreme Court of Arizona followed in Iowa's footsteps nine years later. In its initial decisions adopting the doctrine of reasonable expectations, the court merely used the terminology without citing any authority beyond the traditional rule of construction for ambiguous contract language.¹¹¹ In 1984, however, the *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*¹¹² decision made clear that the doctrine in its substantive form would apply in Arizona. In its opinion, the court noted that the concept was troublesome since most insureds develop a "reasonable expectation" that every loss will be covered by their policies and that the concept "must be limited by something more than the fervent hope usually engendered by loss."¹¹³ The Arizona court, like the Iowa court, concluded that the formulation in section 211 provided a workable resolution of the problem.¹¹⁴ The "dickered deal" is not to be undercut by the boilerplate provisions of a standard form contract, nor should such provisions be allowed to eviscerate reasonably expected coverage.¹¹⁵ Again, the role of the American Law Institute in recognizing the exception cannot be underestimated.¹¹⁶

Now that two courts of last resort have justified their acceptance of the doctrine of reasonable expectation by reliance on the authority of the Restatement (Second) of Contracts, others undoubtedly will rely on the same authority. Does this reliance mean that the Restatement, and in particular the comment to section 211, provides the outer boundaries of the doctrine or is section 211 just a way station on the road to further doctrinal developments? The next section will address this question.

C. *Is There Life Beyond Section 211?*

The "black letter" formulation of the Restatement reflects the American Law Institute's conservative approach in its recognition of an exception to the rule that standardized agreements will be enforced as written. The exception was narrowly drawn so as to assess the situation from the drafter's perspective: "Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."¹¹⁷ Only where a party has "reason to

111. In the first case, the court in construing an ambiguity merely said ". . . the language should be examined from the viewpoint of one not trained in law or in the insurance business." *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 534, 647 P.2d 1127, 1132 (1982). In the second case, the court in refusing to strictly enforce an unambiguous 12 month time limit for bringing suit under a standard fire policy said the consumer's reasonable expectation of coverage "will not be defeated by the existence of provisions which were not negotiated and in the ordinary case are unknown to the insured," citing *Sparks* as the only authority. *Zuckerman v. Transamerica Ins. Co.*, 133 Ariz. 139, 146, 650 P.2d 441, 448 (1982).

112. 140 Ariz. 383, 682 P.2d 388 (1984).

113. *Id.* at 390, 682 P.2d at 395.

114. *Id.* at 390-94, 682 P.2d at 396-99.

115. *Id.* at 390-91, 682 P.2d at 396-97.

116. The majority and concurring opinions relied heavily on the fact that the Restatement (Second) of Contracts recognized the doctrine as part of orthodox contract law. *Id.* at 390-91, 400-01, 682 P.2d at 396-97, 405.

117. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981).

believe"¹¹⁸ that the other party, one who understands that a typical form contract is being used, would not have assented to a particular term is that term to be ignored. In most modern insurance transactions, there would be little argument over the fact that the insured would be taken to understand that a typical or standard form was being used to embody the agreement. On the other hand, application of the exception requires taking the perspective of the insurer.¹¹⁹ As it is almost always the insured who will want to avoid a term of the policy or form contract, the decision maker asked to apply the exception must focus on information that was available to the insurer, *i.e.*, what the insurer had reason to believe. If adhered to faithfully, this approach could disclose a significantly different "reasonable belief" from that derived by application of the Keeton formulation—the objectively determinable reasonable expectations of the insured.¹²⁰ The difference in result with the Keeton formulation is likely because this formulation does not dictate any particular perspective.

In a relationship between insurer and insured, the insurer knows more about insurance transactions and will therefore know many things of which the insured is quite likely ignorant. For example, the insurer will be conversant with important underwriting considerations—including differentials in premiums arising from the inclusion or exclusion of certain terms or clauses, the prevalence of certain terms or clauses in various types of policies, and the problems arising from the claims process where certain terms or clauses are omitted. The fact that the insurer probably has this information could well affect a decision about what an insurer had reason to believe about an insured's expectations. A court might conclude, in such circumstances, that the insurer did not have "reason to believe"—a term that may require a stronger form of cognition than "reason to know,"¹²¹—that the insured would not have assented.

The insurer should be entitled to prove the complete extent of its knowledge in any determination of whether it had reason to believe even though the standard employed in section 211(3) is an objective one.¹²² For example, should not the insurer's perspective include a life insurer's knowledge of the benefits of a conditional receipt that inure to an insured? And should not this knowledge tip the scales away from a finding that a reasonable insurer had "reason to believe" that an applicant would expect immediate coverage? What about the marketing of air-travel trip insurance through vending machines? Should not

118. In the original tentative draft of section 211 (then Section 237), the Reporter used the phrase "reason to know" but this was changed to "reason to believe" during the drafting process. It was suggested that the latter was more restrictive and would narrow the applicability of the exception. See 47 A.L.I. PROC. 525, 534 (1970).

119. See Murray, *The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts*, 123 U. PA. L. REV. 1342, 1378 (1975).

120. See *supra* notes 10 and 76-77 and accompanying text.

121. Perhaps this is why the Reporter for the Restatement (Second) of Contracts thought "believe" was more restrictive than "know." See *supra* note 118.

122. This is made clear by the Reporter's response to an inquiry regarding the nature of the standard, *i.e.*, whether it involved an objective or subjective determination:

PROFESSOR BRAUCHER: Well, "reason to believe" is an objective standard requiring the exercise of judgment by the reasonable man, but it is a judgment exercised in the light of the facts available to the party whose reason to believe is in question

47 A.L.I. PROC. 535 (1970).

the insurer's knowledge about the greater incidence of private aircraft accidents in contrast to those of commercial airlines weigh in the balance and affect the decision as to whether an insured's expectations of being covered for all types of air travel were reasonable? The fact that a reasonable insurer may be aware that insureds do not understand the terms of a conditional receipt or the limitations of air-travel trip insurance should not be ignored. Nevertheless, the entire body of knowledge of the insurer surely should be considered in a determination of what should have been "reasonably believed" by the insurer. Thus, the Restatement formulation contains a perspective, perhaps even a bias, that does not exist in the Keeton formulation or, more importantly, in any of the decisions that adopted the doctrine of reasonable expectations prior to *C & J Fertilizer* and *Darner Motor Sales*. In contrast with the Restatement formulation, these formulations would appear to be more faithful to the notion that the drafter of the adhesion agreement must bear the consequences of any reasonable misunderstanding by the adhering party, even where there is no ambiguity in the language of the contract, so long as the misunderstanding was fostered by the drafter. There is no requirement that the insurer be aware of facts that would cause it to believe the insured's expectations would be defeated. Moreover, there is no requirement that the facts even be available to the insurer so that it should have known of the insured's expectations. The insurer could be completely ignorant of the obfuscating factors or their effect and the insured might still prevail.

In addition to the requirement that courts consider the insurer's perspective when asked to apply the exception set out in section 211, the entire section seems to contemplate that application of the exception requires a conclusion that the insurer had "reason to believe" that the insured would misunderstand a particular term, not merely that the insurer had "reason to believe" that the insured would expect the contract as a whole to provide coverage that it in fact did not provide.¹²³ This interpretation of the section is reinforced by the notion that there must be an actual offending term—one that is bizarre or oppressive, eliminates the dominant purpose of the transaction, or eviscerates terms which were the subject of actual agreement—not merely an omission or failure to provide coverage. In other words, the exception under section 211 can be applied, arguably, only to actual terms establishing exclusions, conditions, or definitions that affect the insured's expectations about another term, for example a coverage provision, in the policy. It cannot be applied to create a coverage provision that is not already present in the policy.¹²⁴ This limitation does not exist in the Keeton formulation.

123. Although the Reporter indicated there was no intent not to cover the case of expected but omitted terms, *id.* at 526-27, the matter was not clarified in the final draft. Perhaps the Reporter believed such situations would be adequately covered under the law of reformation, *id.* at 533-34, because this would be a term that the insurer had reason to believe the insured wanted included. Thus, there would be either a mutual mistake or unilateral mistake induced by inequitable conduct on the part of the insurer, types of conduct that give rise to the remedy of reformation. See D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 11.6 (1973).

124. This position would be consistent with what was once clearly the majority rule that the doctrine of estoppel is not available to bring within the coverage of an insurance policy risks not covered by its terms, see Annot. 1 A.L.R.3d 1149, but there are a growing number of jurisdictions that have rejected it. Two of the jurisdictions that have adopted the minority position happen to be states that have clearly adopted the doctrine of reasonable expectations. See *Darner Motor Sales v. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 395, 682 P.2d

Did the supreme courts of Iowa and Arizona mean to adopt these more restrictive formulations of the Restatement? The answer to this question is not readily apparent from a reading of *C & J Fertilizer* because that opinion indicates that even the insurer's agent in the case at issue was surprised by the policy's narrow definition of burglary,¹²⁵ a fact that constitutes strong evidence that the insurer had reason to believe that the insured would not have agreed to the term. This evidence would clearly support a finding that the definition would be surprising to an insured, perhaps even bizarre, and that this information was available to the insurer. In addition, the insured had specific concerns about coverage for burglary and had discussed these with the agent. These discussions addressed the requirement that there must be evidence of entry but not the requirement that the evidence must consist of visible marks on the exterior point of entry.¹²⁶ Thus, the included definition limited the coverage that the insured expected to receive, thereby undercutting the dominant purpose of the contract. Finally, there did not appear to be any attempt on the part of the insurer to take advantage of the test under section 211 at trial,¹²⁷ an understandable omission when it was not clear that the Restatement formulation was or would be the law in Iowa.

Had the insurer resorted to the Restatement test, evidence of the claims processing experience of the industry under burglary policies surely would have been relevant. The fact that an insured easily could claim burglary when in fact the loss involved a theft by an employee or other "inside job" would be weighed in a determination whether the insurer had "reason to believe" that the insured would have objected to the definition. Should not the cost of coverage without the requirement of exterior visible marks of entry also be relevant to the decision whether the insured would have assented? There is no mention of these factors in the case. In short, there was little specific reference to what the insurer had reason to believe, although the evidence would support a finding that the insurer had reason to believe that the insured expected coverage.

As to the question of whether the Restatement exception may be employed to create coverage that did not otherwise exist, the *C & J Fertilizer* opinion does not contribute to an answer. The policy in question did provide coverage, but that coverage was unduly narrowed by another term, the policy definition of burglary.

Later cases, while acknowledging that *C & J Fertilizer* refined the concept of reasonable expectations in Iowa,¹²⁸ omit any reference to the insurer's "rea-

388, 400 (1984); *Harr v. Allstate Ins. Co.*, 54 N.J. 287, 305, 255 A.2d 208, 218 (1969). *But see* *State v. Underwriters at Lloyds, London*, 755 P.2d 396 (Alaska 1988) (indicating doctrine of reasonable expectations may not apply to create coverage that does not otherwise exist).

125. *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 171-72 (Iowa 1975).

126. *Id.*

127. The requirement of visible marks of entry for burglary and similar coverages was not a rare provision in the insurance world. Insurers had begun to employ such a provision because of the ease with which an insured could assert a burglary claim absent such a provision and to distinguish it from other coverages that provided for employee dishonesty and mysterious disappearance.

128. *See, e.g., Grinnell Mut. Reinsurance Co. v. Voeltz*, 431 N.W.2d 783, 786 (Iowa 1988) (holding that insureds would reasonably expect coverage for liability for baby-sitting activities under homeowners policy and that insurer knew the "business pursuits" exclusion was ambiguous on this point).

son to believe."¹²⁹ That portion of the comment to section 211 is no longer mentioned. In its place, the Supreme Court of Iowa appears to have adopted a more neutral test along the lines of the Keeton formulation. In doing so, the court has repeated the basic proposition that the doctrine is an exception to the general rule of enforceability. If the insurance policy or related form is not ambiguous, *i.e.*, if an ordinary person would not misunderstand the extent of coverage from a reading of the standardized form, the doctrine of reasonable expectations does not apply unless there are other circumstances attributable to the insurer which fostered the insured's expectations.¹³⁰ The "other circumstances" include the three situations set out in the comment to section 211 of the Restatement (Second) of Contracts. A term that (1) is bizarre or oppressive, (2) eviscerates other terms explicitly agreed to, or (3) eliminates the dominant purpose of the transaction will not be enforced.¹³¹ Borrowing further from this comment, the Iowa court has held that reasonable expectations may be established by proof of the underlying negotiations or inferred from the circumstances,¹³² but there is no mention of whether these activities might induce a reasonable expectation of coverage that did not otherwise exist. Finally, the court also has decided that the issue of whether the insured's expectations are reasonable is one of law solely for the court to decide, except where a question of fact may arise through the introduction of extrinsic evidence.¹³³ In short, it is not clear at this point that Iowa strictly follows the Restatement, but neither is it clear that Iowa intends to deviate from the Restatement rule or what form such deviation will take.

Like the Iowa court, the Supreme Court of Arizona has not emphasized the restriction in the Restatement that the insurer must have reason to believe that the insured would not have assented to the offending term.¹³⁴ On the other hand, there is stronger indication that the Arizona court does not view the Restatement formulation as the final word on the doctrine of reasonable expectations. In *Gordinier v. Aetna Casualty & Surety Co.*,¹³⁵ a wife, who was not living with her husband at the time of the accident, brought an action to collect uninsured motorist benefits under a policy that required her to be a resident of her husband's household. Despite the absence of any ambiguity in policy language, the Arizona Supreme Court held that there were substantial issues of material fact on the question whether the doctrine of reasonable expectations made the restriction unenforceable. In its opinion, the court synthesized the existing Arizona cases and other authorities and described the situations in which

129. See *Moritz v. Farm Bureau Mut. Ins. Co.*, 434 N.W.2d 624, 626 (Iowa 1989); *AID (Mutual) Ins. v. Steffen*, 423 N.W.2d 189, 192 (Iowa 1988); *Lepic v. Iowa Mut. Ins. Co.*, 402 N.W.2d 758, 761 (Iowa 1987); *Cairns v. Grinnell Mut. Reinsurance Co.*, 398 N.W.2d 821, 825 (Iowa 1987); *Farm Bureau Mut. Ins. Co. v. Sandbulte*, 302 N.W.2d 104, 112 (Iowa 1981).

130. *Farm Bureau Mutual*, 302 N.W.2d at 112-13.

131. See cases cited *supra* note 129.

132. *Cairns*, 398 N.W.2d at 825; *Farm Bureau Mutual*, 302 N.W.2d at 112.

133. *Moritz*, 434 N.W.2d at 626; *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d at 172. See RESTATEMENT (SECOND) OF CONTRACTS § 212, comment d (1981).

134. See *supra* notes 117-19 and accompanying text.

135. 154 Ariz. 266, 742 P.2d 277 (1987).

the doctrine applies. Standardized provisions of insurance contracts will not be enforced, even though unambiguous, in the following categories of situations:

1. Where the contract terms, although not ambiguous to the court, cannot be understood by the reasonably intelligent consumer who might check on his or her rights, the court will interpret them in light of the objective, reasonable expectations of the average insured . . . ;
2. Where the insured did not receive full and adequate notice of the term in question, and the provision is either unusual or unexpected, or one that emasculates apparent coverage . . . ;
3. Where some activity which can be reasonably attributed to the insurer would create an objective impression of coverage in the mind of a reasonable insured . . . ;
4. Where some activity reasonably attributable to the insurer has induced a particular insured reasonably to believe that he has coverage, although such coverage is expressly and unambiguously denied by the policy¹³⁶

The first category incorporates that aspect of the Keeton formulation suggesting that overly technical wording or complicated arrangements of terms may result in an "objectively determinable reasonable expectation" of coverage even though restrictive terms might be understood through "painstaking" study.¹³⁷ The Arizona court establishes a test of whether a reasonably intelligent consumer might understand the terms, but the court does not make clear whether extrinsic evidence will be admissible on this issue and, if so, whether, when the evidence is conflicting, it will be the trier of fact's responsibility to decide the issue.¹³⁸ This category includes situations with more of the characteristics of the situations regarding a rule construing ambiguities and complements those situations that are covered by section 211 of the Restatement (Second) of Contracts. Although the first category involves an important and well settled application of the doctrine of reasonable expectations, the Arizona court's application of the doctrine to situations included in it does not reveal anything about the operation of section 211. The application of the doctrine of reasonable expectations to the fourth category of situations may be equally unrevealing.

The fourth category is somewhat of an anomaly. It appears to include situations that are already covered by orthodox doctrines that for some time have been employed in the judicial regulation of contractual relations. For example, application of the doctrine would appear to provide an exception to the parol evidence rule in that evidence extrinsic to the written agreement could be introduced to prove a claim of waiver, estoppel or election. Also, a suit for reformation would seem to be within its purview. Perhaps there may be some cases that would not be covered by these doctrines, but they are not readily apparent and the cases covered by the category seem to add little to the doctrine of reasonable expectations. The remaining categories, however, are instructive.

The second category includes those situations covered by the exception to section 211, *i.e.*, situations where there are unusual or unexpected terms not

136. *Id.* at 272-73, 742 P.2d at 283-84.

137. See *supra* notes 77-78 and accompanying text.

138. In addition to the Supreme Court of Iowa, see *supra* note 133 and accompanying text, the Supreme Court of Alaska has ruled that the issue of reasonable expectations is a legal question for the court. See *INA Life Ins. Co. v. Brundin*, 533 P.2d 236, 246 (Alaska 1975); *O'Neill Investigations Inc. v. Illinois Employers Ins. of Wausau*, 636 P.2d 1170 (Alaska 1981); *Jarvis v. Aetna Cas. & Sur. Co.*, 633 P.2d 1359 (Alaska 1981).

known to the insured. It, however, goes beyond section 211 in that it does not require that the issue of reasonable expectations be viewed from the insurer's perspective. As indicated earlier, inclusion of such situations is a significant departure from the Restatement. On the other hand, the court in describing this category does speak of a policy "term" or "provision," which may indicate that it does not include situations where the expectation is of coverage that does not otherwise exist. If the court's formulation is limited in this way, it conforms to the Restatement's formulation and significantly limits the doctrine.

The third category is the most intriguing of all, as it apparently embodies the original Keeton formulation, which would indicate that the Arizona Supreme Court views the Keeton principle as being different from the section 211 principle. To be included in the third category, there must be evidence beyond the insured's belief that coverage has been afforded. This evidence must show that the insurer, or someone authorized to act on its behalf, has engaged in some activity that would lead a reasonable person in the insured's position to expect coverage. Although the expectation must be reasonable when judged in an objectively determinable manner, there are numerous possible situations that would be included in this category. For example, application of the doctrine does not require consideration from an insurer perspective and, moreover, application is not limited to situations where coverage otherwise exists under the policy. It could include situations where a policy provides no coverage for the particular risk, but "some activity" of the insurer fosters a reasonable expectation of coverage. It also could include situations where the expectation is fostered during, or even at the cessation of, the contract period. The expectation would not have to arise at the inception of the contract. Finally, the proper division of function between the judge and jury is not addressed in the setting of the third category. All in all, the third category provides open-ended opportunities for the court to apply the doctrine to new situations. It may prove to be the vehicle by which the Arizona Supreme Court will recognize that the doctrine of reasonable expectations is neither synonymous with nor limited by the formulation in section 211 of the Restatement (Second) of Contracts.

It has taken several decades for the principle of reasonable expectations to evolve into a doctrine and only in the last two decades has the doctrinal content really been refined into a core set of rules. These rules are embodied in section 211 of the Restatement (Second) of Contracts. However, both Iowa and Arizona already appear to have moved beyond the Restatement requirement that the reasonableness of the insured's expectations must be determined from what the insurer had reason to believe about those expectations. Perhaps Arizona, by recognizing the Keeton formulation as establishing an independent category of situations where the doctrine should apply, has moved even further beyond the limits of the Restatement. Therefore, the adoption of section 211 of the Restatement (Second) of Contracts by the Iowa and Arizona courts as the foundation of the doctrine of reasonable expectations appears to provide for healthy development, rather than for a static rule. Although an important touchstone has been provided for the application of the doctrine, the Iowa and Arizona opinions do not purport to establish the outer boundaries of application. The doctrine

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still seems to be evolving. Perhaps the last decade of this century will reveal new insights into the applicability of the doctrine of reasonable expectations.

VI. CONCLUSION

The last two decades have witnessed the birth of a principle and its maturation into a body of law that accommodates competing interests of parties to standardized agreements. The standard form contract is a necessity in today's society, but there is a special need for an exception to the wholesale enforcement of such documents. This need is particularly acute in those situations where public policy requires that the costs of serious accidents and sickness be transferred and distributed over large numbers of people to prevent too severe an impact on any one individual or entity. This transfer and redistribution of accident and sickness costs is the business of insurance, and standard forms are necessary to the success of that business. However, a necessary element of the distribution of these costs is that the system operate in a fair and equitable manner. No insurance system can be fair and equitable where would-be insureds are deprived of the opportunity to participate intelligently in the system because of some obfuscating factor that is beyond their control. The principle of reasonable expectations emerged in recognition of the need to eliminate these barriers to intelligent participation. It has evolved over the past two decades into a doctrine that balances the needs of insureds against those of insurers, as it continues to further the overriding goal of fair and equitable allocation of costs of accidents and sickness in this society. Although it has matured in many respects, it appears that it has not stopped growing, nor should it.

